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SUPREME COURT OF THE UNITED STATES
October Term, 1987

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections, and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida,
Petitioners,

vs.

LENSON HARGRAVE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN AND FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Does **Hitchcock v.Dugger**, 95 L.Ed 2d 347, (1987), represent new law sufficient to satisfy a **Reed v. Ross**, 468 U.S. 1 (1984) cause showing, and if so, is the actual prejudice prong of **Wainwright v. Sykes**, 433 U.S. 72 (1972), and **United States v. Frady**, 456 U.S. 152 (1982), subsumed, thus eliminiating the Eleventh Circuit Court of Appeals' responsibility in determining cause and actual prejudice?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections, and
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vs.

LENSON HARGRAVE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL IN AND FOR THE ELEVENTH CIRCUIT

The petitioners, Richard L. Dugger and Robert A. Butterworth, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Eleventh Circuit Court of Appeals, sitting **en banc** entered in **Hargrave v. Dugger**, 832 F.2d 1528 (11th Cir. 1987).

OPINIONS BELOW

The opinion of the Eleventh Circuit panel appears at 804 F.2d 1182 (11th Cir. 1986) and is reprinted in the appendix hereto, pages A-49 through A-109. Rehearing was granted, the panel opinion vacated it appears at 809 F.2d 1486 (11th Cir. 1987).

The decision by the Eleventh Circuit Court of Appeals **en banc** in **Hargrave v. Dugger**, is reported at 832 F.2d 1528 (11th Cir. 1987) and is reprinted in the appendix hereto at pages A-1 through A-48.

The decision of the Florida Supreme Court on direct appeal, upholding the judgment and sentence is reported in **Hargrave v. State**, 366 So.2d 1 (Fla. 1978), **cert. denied** 444 U.S. 919 (1979).

JURISDICTION

The decision of the Eleventh Circuit Court of Appeals sitting **en banc** was decided November 13, 1987. Rehearing was denied January 4, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV of the Constitution of the United States provides, **inter alia** that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VIII provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment X provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

Sometime in mid-May, 1974, Hargrave and his friend, Lawrence Karge, planned the robbery of a U-Tote-M convenience store in Miami, Florida. Karge was a former employee of the store and was familiar with the store's alarm system. In the early evening of May 17, 1974, Hargrave entered the store alone. He approached the clerk, Joseph Jones, who was the only other person in the store. Petitioner pulled out a gun

and told Jones it was a hold-up. Jones raised his hands, and Hargrave told him to hand over the money in the cash register. Jones tried to comply, but could not because the cash register was jammed. Hargrave stepped backwards and told Jones, "Open it up." Jones replied, "I can't, it's jammed. I can't." Then Hargrave fired two shots at Jones; one missed, but the other hit Jones in the chest. Jones gasped and fell backward to the floor. Petitioner walked behind the counter and tried, unsuccessfully, to open the register. As Hargrave was walking back toward the front of the counter, a man entered the store and asked him if the store carried pickled pig's feet. Hargrave replied, "No, we don't. We are out of them right now." After the man walked out of the store, got into his car, and drove off, Hargrave walked around to the front of the counter and shot Jones in the head.

Hargrave then left the store and walked to the parking lot of a nearby bar to wait for Karge, who arrived about two minutes later and drove Hargrave home. After eating dinner and changing his clothes, Hargrave left for his job as a night security guard at a shopping center.

About seven months later, Hargrave was arrested for the murder of Joseph Jones. At the station house following his arrest, Hargrave waived his **Miranda** rights and signed a statement, confessing to the killing and identifying the location of the murder weapon.

Before trial, Hargrave's counsel informed the court that he doubted whether Hargrave was competent to stand trial and questioned his sanity at the time of the offense, and moved the court for appointment of one or more experts to examine Hargrave. The court appointed

three experts: two psychiatrists and a psychologist, all of whom determined that Hargrave was competent to stand trial and had been sane at the time of the Jones' murder.

Trial commenced on July 10, 1975. The guilt/innocence phase of the trial took five days and resulted in a jury verdict of first degree murder. The sentencing phase of the trial began shortly after the jury returned its verdict and was completed the same day. The state called three witnesses: one of the court-appointed psychologists and two lay witnesses. The psychologist described Hargrave as a sociopath who had "a great deal of difficulty conforming to and adjusting to the mores and demands of society." He said that Hargrave was insecure, apprehensive and hostile. The psychologist also said that Respondent, who was 19 at the time of

the examination, had "a mental age of sixteen to seventeen", and had a history of using drugs, mostly marijuana. The two lay witnesses testified that prior to Hargrave's arrest, he said that he had killed someone before and it would not bother him to kill again. The defense called one of the court-appointed psychiatrists and Respondent's mother. The psychiatrist testified that Hargrave had an "anti-social personality", acted impulsively, and could easily be used by other persons. Hargrave's mother stated that he had been under Karge's influence for a long time. The jury recommended the imposition of the death penalty.

On July 18, 1975, the trial court convened a hearing to sentence Hargrave. The court heard testimony from Hargrave's mother and grandmother (who corroborated the mother's trial testimony), Hargrave's

allocution, and argument from counsel for the state and Hargrave. The court found that four aggravating circumstances attended the Jones' murder: (1) the murder was committed while Hargrave was attempting to commit a robbery; (2) the murder was committed "for the purpose of avoiding or preventing a lawful arrest"; (3) the murder was committed for pecuniary gain; and (4) the murder was "especially heinous, atrocious or cruel, in that after initially shooting the victim and while the victim lay helplessly bleeding on the floor, Hargrave deliberatly leaned over the counter and shot the victim in the head".

The court found two mitigating circumstances: (1) Hargrave had "no significant history of criminal activity"; and (2) Hargrave's age, 18 years. The court in its order balanced the factors and agreed with the jury that the aggravating

circumstances outweighted the mitigating circumstances. The trial court imposed the death penalty.

The Florida Supreme Court affirmed Hargrave's judgment and sentence in **Hargrave vs. State** 366 So.2d 1 (Fla. 1978), **cert. denied** 444 U.S. 919 (1979). Hargrave then filed a motion in the trial court to vacate the judgment and sentence under Florida Rule of Criminal Procedure 3.850 in 1977. That motion was denied and the Florida Supreme Court affirmed that denial in **Hargrave v. State**, 396 So.2d 1127 (Fla. 1981). Hargrave filed a second post-conviction motion in the trial court, which was also denied. The Florida Supreme Court affirmed that denial in **Hargrave v. State**, 427 So.2d 713 (Fla. 1983).

He filed his first habeas corpus petition in the United States District Court, Southern District of Florida,

raising seven separate grounds for relief. Federal district court Judge Kehoe, on February 6, 1984, denied all relief in **Hargrave v. Wainwright**, Case No. 80-2679-CIV-JWK. An appeal followed to the United States Court of Appeals, Eleventh Circuit, and on November 3, 1986, the court affirmed the denial of habeas corpus relief in **Hargrave v. Wainwright**, 804 F.2d 1182 (11th Cir. 1986). Rehearing was filed and granted with the opinion vacated in **Hargrave v. Wainwright**, 809 F.2d 1486 (11th Cir. 1987). On November 13, 1987, the **en banc** court of the Eleventh Circuit Court of Appeals, in **Hargrave v. Dugger**, 832 F.2d 1528 (11th Cir. 1987), reversed and remanded, concluding that:

> The totality of the circumstances reflect that as in Hitchcock, Hargrave's sentencing proceedings did not comport with Skipper v. North Carolina, 106 S.Ct. 1669 (1986), Eddings v. Oklahoma 455 U.S. 104 (1982), and

> Lockett v. Ohio 438 U.S. 586 (1978). We therefore reverse and remand to the distict court with instructions to enter an order granting the application for a writ of habeas corpus, unless the State, within a reasonable period of time, either resentences Hargrave in a proceeding that comports with the requirements of Lockett or vacates the death sentence and imposes a lesser sentence consistent with law. See Hitchcock, 107 S.Ct. at 1824-25. Reversed and Remanded.

832 F.2d at 1535.

REASONS FOR GRANTING THE WRIT

> DOES **HITCHCOCK V. DUGGER**, 95 L.ED.2D 347 (1987) REPRESENT NEW LAW SUFFICIENT TO SATISFY A **REED V. ROSS**, 468 U.S. 1 (1984) CAUSE SHOWING, AND IF SO IS THE ACTUAL PREJUDICE PRONG OF **WAINWRIGHT V. SYKES**, 433 U.S. 72 (1972), AND **UNITED STATES V. FRADY**, 456 U.S. 152 (1982) SUBSUMED, THUS ELIMINATING THE ELEVENTH CIRCUIT COURT OF APPEALS' RESPONSIBILITY IN DETERMINING CAUSE AND ACTUAL PREJUDICE?

Concluding that **Hitchcock v. Dugger** 95 L.Ed.2d 347 (1987) breathed new vitality

into Hargrave's procedurally barred claim, the Eleventh Circuit, sitting **en banc** found cause under a **Reed v. Ross**, 468 U.S. 1 (1984) novel claim theory and "presumed" actual prejudice.[1] Clearly, the court has confused what constitutes cause for failing to raise a **Hitchcock** claim, and the actual prejudice necessary to prevail. The Eleventh Circuit continues to do so. See **Adams v. Wainwright**, 804 F.2d 1526 (11th Cir. 1986) modified **Adams v. Dugger**, 816 F.2d 1493 (11th Cir. 1987), cert. pending,

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[1] Not unmindful of its responsibility to address the two prong test of cause and actual prejudice **Wainwright v. Sykes**, 433 U.S. 72 (1977); **Engle v. Issac**, 456 U.S. 197 (1982); the **en banc** court paid minimum lip-service to "what" actual prejudice was shown. The court opined:

> "**Hitchcock** has breathed new vitality into claims based on the exclusion of non-statutory mitigating factors, and Hargrave would be prejudiced if he were not allowed to now raise such a claim."

Dugger v. Adams, Case No. 87-121, filed July 20, 1987. [2] The failure to analyze "how" the facts resulted in prejudice to Hargrave becomes evident when the court in comparing the alleged similarities between Hitchcock and Hargrave reasons:

> Whether or not there was a procedural default, we hold that Hitchcock showed sufficient cause and prejudice to obtain a review on the merits of his claim under **Lockett v. Ohio**, 438 U.S. 586 (1978). See **Engle v. Issac**, 456 U.S. 107 (1982); **Wainwright v. Sykes**, 433 U.S. 72 (1977). Since there was a failure to meet the constitutional standards required by **Lockett** in a capital sentencing procedure, we reverse the district court's denial of relief. **See Hitchcock v. Dugger**, _____U.S._____, 107 S.Ct. 1821 (1987), 95 L.Ed.2d 347 (1987).

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[2] In this similarly postured case, the Eleventh Circuit combined cause for and actual prejudice regarding a **Reed v. Ross** 468 U.S. 1 (1984) new law "cause" showing stemming from **Caldwell v. Mississippi**, 105 S.Ct. 2633 (1985).

Hargrave v. Dugger, 832 F.2d at _____.

Hitchcock v. Dugger, supra, was never a procedural bar case.[3] Circuit Judge

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[3] No mention is made by the majority opinion that Hitchcock's **Lockett** claim was entertained on the merits throughout its legal trek. Compare Hargrave where procedural bar to review this claim was applied. See panel opinion **Hargrave** 804 F.2d 1182 (11th Cir. 1986), reh. granted and opinion vacated 809 F.2d 1486 (11th Cir. 1987). Procedural bar upheld in identical Lockett/Hitchcock claims--**Johnson v. Wainwright** 806 F.2d 1479 (11th Cir. 1986); **Straight v. Wainwright**, 772 F.2d 674 (11th Cir. 1985); cert. denied 106 S.Ct. 1502 (1986); **Songer v. Wainwright**, 769 F.2d 1488 (11th Cir. 1985) (**en banc**), cert. denied 107 S.Ct. 1982 (1987); **Thomas v. Wainwright** 767 F.2d 738 (11th Cir. 1985), cert. denied 106 S.Ct. 1241 (1986); **Francois v. Wainwright**, 763 F.2d 1188 (11th Cir. 1985); **Palmes v. Wainwright** 725 F.2d 1511 (11th Cir. 1984) cert. denied 469 U.S. 873 (1984); **Alvord v. Wainwright**, 725 F.2d 1282 (11th Cir. 1984), cert. denied 469 U.S. 956 (1984); **Dobbert v. Strickland**, 718 F.2d 1518 (11th Cir. 1983), cert. denied 468 U.S. 1220 (1984); **Shriner v. Wainwright**, 715 F.2d 1452 (11th Cir. 1983) cert. denied 465 U.S. 1051 (1984); **Foster v. Strickland**, 707 F.2d 1339 (11th Cir. 1983), cert. denied 466 U.S. 993 (1984); **Antone v. Strickland**, 706 F.2d 1534 (11th Cir. 1983); **Booker v. Wainwright**, 703 F.2d

Tjoflat's specially concurring opinion acknowledges same. 832 F.2d at 1536.

The proper analysis of this case can be found in the panel's decision, subsection II(c). Appendix pages A-67-71. Therein the panel reasoned that none of the situations identified by this court in **Reed v. Ross**, 468 U.S. 16-17 would "cover" the instant case. The panel opined:

> . . .Lockett did not overrule Supreme Court precedent and was not contrary to a near-unanimous body of lower court authority. And **Lockett** did not disapprove a practice that the Supreme Court had arguably sanctioned in earlier cases. Rather, the rule in **Lockett** was the product of evolving capital punishment law and "followed from the earlier decisions of the [Supreme] court and from the court's insistence that capital punishment be imposed fairly, and with reasoned

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3 cont.
1251 (11th Cir. 1983), cert. denied 464 U.S. 922 (1983); **Ford v. Strickland**, 696 F.2d 804 (11th Cir. 1983) (**en banc**) cert. denied 464 U.S. 865 (1983).

consistency, or not at all." **Eddings v. Oklahoma**, 455 U.S. 104, 112, 102 S.Ct. 869, 876 (1982).

Moreover, at the time of petitioner's trial in 1975, the ambiguous wording of Florida's statute left open the question of whether under Florida law the presentation of mitigating circumstances was limited to those factors enumerated in the statute. [cites omitted] And although the Supreme Court of Florida had suggested that mitigating circumstances were limited to those found in the statute [footnote omitted], it did not address the scope of admissible evidence until after it issued its opinion in petitioner's direct appeal.[18] In light of the evolving nature of capital sentencing law due to the Supreme Court's decision in **Furman v. Georgia**, 408 U.S. 238, 92 S.Ct. 2726 (1972) (per curiam) (plurality), and the uncertain meaning attached to Florida's new capital sentencing statute, [footnote omitted] we find no "cause" for petitioner's failure to object at trial or on direct appeal. Clearly, there was a reasonable basis in 1975 upon which petitioner could have made the constitutional challenge he wishes to make today. . . . Because petitioner has failed to show cause for the procedural

default of his Lockett claim, we are barred by **Wainwright v. Sykes**, from considering the merits of that claim.[20]

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[18] The Supreme Court of Florida issued its opinion on petitioner's direct appeal on June 20, 1978. It was not until more than two months later, on September 7, 1978, that the supreme court squarely addressed the scope of admissible mitigating evidence, holding that its construction of the statute has been that all relevant circumstances may be considered in mitigation, and that the factors listed in the statute merely indicate the principal factors to be considered. **Songer v. State**, 365 So.2d 696, 700 (Fla. 1978) (per curiam) cert. denied, 441 U.S. 956, 99 S.Ct. 2185 (1979).

[20] The test enunciated by **Sykes** is two-pronged: a habeas petitioner must show both cause and prejudice for his procedural default in the state courts. Because the petitioner in this case did not show cause, we need not address the issue of prejudice.

Hargrave, panel opinion, 804 F.2d at 1189-1190.

Hitchcock v. Dugger, supra, identified a clear Lockett violation and because it was properly before the court, it was resolved on the merits. However, **Hitchcock** did not create new law as envisioned in **Reed v. Ross, supra** to support "cause for" or "actual prejudice" to overcome a procedurally barred issue.[4] This issue was

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[4] In 1937, the court acknowledged the possibility of mitigation impacting on the sentence to be imposed in **Pennsylvania ex rel. Sullivan v. Ashe,** 302 U.S. 51, 82 L.Ed. 43 (1937), wherein it was held:

> "For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and kind of discipline that ought to be imposed upon him. 302 U.S. at 55

rest in the percolating waters of evolving legal theory and as such, under the circumstances, was susceptable to challenge. **Smith v. Murray**, 91 L.Ed.2d 434, 446 (1986).

Assuming **Hitchcock v. Dugger, supra** supports "cause", the new law theory of **Reed v. Ross, supra** does not eliminate consideration of prejudice. The Eleventh Circuit in **Hargrave** as well as in **Adams v. Dugger, supra**, ceased further analysis once cause, based on the new law theory, was found. **United States v. Frady**, 456 U.S. 152, 170 (1982) provides for actual prejudice if an error of constitutional dimension occurring at trial works to the

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4 cont.
See, also: **McGautha v. California**, 402 U.S. 183, 201-207 (1971); and compare **California v. Ramos**, 93 L.Ed.2d 934, 942 (1987) (O'Conner, J. concurring) **Woodson v. North Carolina**, 428 U.S. 280, 295-296 (1976).

defendant's actual and substantial disadvantage, infecting the entire trial. (Jury instruction relieved burden of government to prove malice as element of crime). Albeit the ill-fated instructions in **Hitchcock** were read to the jury herein, the record as detailed by the panel decision evidenced no other restriction placed on the jury or the court regarding the mitigation presented. The court observed:

> ...The sentencing phase of the trial began shortly after the jury returned its verdict and was completed the same day. The state called three witnesses, one of the court-appointed psychologists and two lay witnesses. The psychologist described petitioner as a sociopath who has "a great deal of difficulty conforming to and adjusting to the mores or demands of society." He said that petitioner was insecure, apprehensive, and hostile. The psychologist also said that petitioner, who was nineteen at the time of the examination, had "a mental age of sixteen to

> seventeen" and has a history of using drugs, mostly marijuana. The two lay witnesses testified that, prior to petitioner's arrest, he said that he had killed someone before and it would not bother him to kill again. The defense called one of the court-appointed psychiatrists and petitioner's mother. The psychiatrist testified that petitioner had an "anti-social personality", acted impulsively, and could easily be used by other persons. Petitioner's mother stated that petitioner had been under Karge's [co-defendant] influence for a long time. The jury recommended imposition of the death penalty.
>
> On July 18, 1975, the trial court convened a hearing to sentence petitioner. The court heard testimony from petitioner's mother and grandmother (who corroborated the mother's trial testimony), petitioner's allocution, and argument from counsel for the state and petitioner. . . .

Hargrave, 804 F.2d at 1185.[5]

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[5] Additionally, evidence was presented concerning Hargrave's steady employment, below average intelligence, use of drugs and his sociopathic personality. No

The record also reflects that in this senseless murder of a convenience store clerk, Hargrave confessed to the murder and identified the location of the murder weapon. Four aggravating circumstances were found as supported by the evidence, (1) the murder was committed while attempting to commit a robbery; (2) the murder was committed to avoid lawful arrest; (3) the murder was committed for pecuniary gain; and (4) the murder was especially heinous, atrocious or cruel.

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5 cont.
restriction was placed on argument of counsel regarding statutory or non-statutory mitigation. Defense counsel argued to the trial court that a pre-sentence investigation report should be obtained stating "I just feel that every possibility, no matter how remote, must be explored." Appendix pps. A-276. Moreover, non-statutory mitigation was tendered to the jury through the defense witnesses. The sentencing judge in his order discussed and considered the non-statutory mitigation, to-wit: petitioner's employment, intelligence and personality flaws. Appendix, pps. A-114-115.

Two mitigating circumstances were found, (1) Respondent had no significant history of criminal activity and (2) Respondent was eighteen years of age.[6]

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[6] It should be noted that Hargrave argued that he was denied an opportunity to present additional evidence in mitigation in his federal pleadings. For example, Hargrave asserted that his history and background would have revealed abuse by his father. This would have been contradicted by actual testimony at trial by Hargrave's mother, who testified that she and her husband gave him a good home and raised him properly. Evidence of a problematic background was presented through Dr. Sylvester, which revealed Hargrave had a dull-normal intelligence quota and a mental age of 16 or 17. (Hargrave was 19 at time of trial.) There was evidence of brain damage affecting his thinking process due to drug usage. The doctor also found Hargrave had a:

> "Morbid preoccupation with material which suggested a good deal of insecurity, apprehension, fear and of course, the consequent rebellion against this is striking back and not knowing just was was wrong with him." Appendix, pp A-136.

The plainly erroneous assessment of **Hitchcock v. Dugger, supra,** as "novel" or "new law" has resulted in the Eleventh Circuit's complete elimination of the prejudice prong. This relaxation of the rule in **Sykes,** and **Frady,** is a clear attempt to avoid assessing the impact of **Hitchcock** in a case where the state court and lower federal court have found no cause "or" prejudice. The Court's decision in **Sykes** or, for that matter, **Hitchcock** never contemplated such misuse. See: **Smith v. Murray,** 106 S.Ct. 2661 (1986) (where a constitutional violation has probably

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6 cont.
Defense counsel forcefully argued before the jury non-statutory mitigating evidence that Hargrave was a defective child who should not be treated to "spartan" tactics and left to die on an "electrically charged plain". He reviewed Drs. Sylvester's and Corwin's findings and asked the jury to think carefully about whether "we are dealing with a person who is the kind of person the legislature had in mind. . ." for capital punishment. Appendix, pp A-251.

resulted in the conviction of one who is actually innocent, the writ may issue even in absence of cause showing).

Assuming **Hitchcock v. Dugger, supra,** preempts a **Sykes** and **Frady** cause and actual prejudice analysis because of its constitutional impact, guidance as to the applicability of harmless error doctrine is mandated. The Eleventh Circuit Court of Appeals and the Florida Supreme Court left without succor will continue to misapply the limited holding of **Hitchcock, supra.** No effort to apply **Chapman v. California,** 386 U.S. 18 (1967) (harmless error albeit constitutional error) or **Rose v. Clark,** 92 L.Ed.2d 460 (1986) (harmless error--jury instructions) was contemplated by the **en banc** court. See: **Clark v. Dugger,** F.2d_____ (11th Cir. decided December 15, 1987); **Daughtery v. Dugger,** _____F.2d (11th Cir. decided February 12, 1988),

Thompson v. Dugger, 515 So.2d 173 (Fla. 1987), cert. pending **Dugger v. Thompson**, Case No. _____. (State habeas corpus granted on Lockett/Hitchcock claim--no harmless error analysis.)

Beyond per adventure, it can be stated that the Lockett/Hitchcock issue was not so egregious as to warrant reversal of the capital sentence herein imposed.[7] However, as noted in **Rose v. Clark**, 92 L.Ed.2d at 474, although this court has authority to decide "constitutional error" was harmless under the **Chapman** standard, it has done so sparingly. Therefore, the matter should be remanded to the Eleventh Circuit Court of

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[7] See: **Francois v. Wainwright**, 763 F.2d 1188 (11th Cir. 1985) (non-statutory mitigation as to poor childhood, abuse, would overcome aggravating circumstances), **Thompson v. Wainwright**, 787 F.2d 1447, 1457-1458 (11th Cir. 1986) (no set of circumstances in mitigation would have resulted in life recommendation.)

Appeals for a determination of whether the error committed (assuming procedural bar does not apply to **Hitchcock** cases) was harmless beyond a reasonable doubt. **United States v. Hastings**, 461 U.S. 499, 510 (1983); **Delaware v. VanArsdell**, 475 U.S. 673, 684 (1986).

CONCLUSION

For these various reasons, the petition for writ of certiorari should be granted.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5102

LENSON HARGRAVE,

Petitioner-Appellant,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections,
State of Florida,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(November 13, 1987)

Before RONEY, Chief Judge, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, ANDERSON, CLARK and EDMONDSON, Circuit Judges.

RONEY, Chief Judge:

The Court took this case in banc to consider the issue of whether a procedural default in this pre-Lockett Florida murder case foreclosed petitioner Lenson A. Hargrave's right to a review of his claim that his death sentence was invalid for failure of the judge and jury to properly consider non-statutory mitigating evidence at the sentencing hearing.

The federal district court had denied relief, and a panel of this Court affirmed on the ground there was a state federal default for which defendant had not shown sufficient cause so that his Lockett

*Honorable John C. Godbold and Honorable Joseph W. Hatchett did not participate in the consideration of this case.

claim is barred from review in federal habeas corpus. Hargrave v. Wainwright, 804 F.2d 1182, 1187-90 (11th Cir. 1986), reh'g granted and opin. vacated, 809 F.2d 1486 (Cir. 1987).

Whether or not there was a procedural default, we hold that Hargrave showed sufficient cause and prejudice to obtain a review on the merits of his claim under Lockett v. Ohio, 438 U.S. 586 (1978). See Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977). Since there was a failure to meet the constitutional standards required by Lockett in a capital sentencing procedure, we reverse the district court's denial of relief. See Hitchcock v. Dugger, 107 S.Ct. 1821 (1987).

Essentially the Lockett claim is asserted in three parts: first, the jury was not properly instructed that it could

consider non-statutory mitigating factors in the sentencing proceeding; second, Hargrave's counsel believed that he was limited to the presentation of statutory mitigating evidence at the sentencing hearing; and third, the sentencing judge and the Supreme Court of Florida did not fully consider non-statutory mitigating circumstances.

The panel held that there was a procedural default in presenting this claim to the Florida courts with the following analysis:

> Petitioner did not object to the court's jury instructions on mitigating circumstances at trial. Nor did petitioner object to those instructions on direct appeal to the Supreme Court of Florida. No objection was made, in fact, until after the supreme court issued its opinion affirming petitioner's conviction and sentence; the petitioner raised the issue for the first time in a petition for rehearing.

At the time of petitioner's appeal, Rule 3.14(b) of the Florida Appellate Rules (1962) governed the contents of a petition for rehearing: 'The petition for rehearing shall not assume a new ground or position from that taken in the original argument or briefs upon which the cause was submitted. . . .' Thus, an argument could not have been raised for the first time in a petition for rehearing. See Delmonico v. State, 155 So.2d 368 (Fla. 1963) (initial presentation of matter on rehearing was improper) (footnote omitted); Leslie Bros. v. Roope, 108 Fla. 289, 148 So. 212 (1933) (supreme court will not on petition for rehearing after affirmance, reopen case to permit presentation of different theory from that adopted below); Price Wise Buying Group v. Nuzum, 343 So.2d 115, 117 (Fla. Dist. Ct. App. 1977) (appellate court would not consider an issue raised for first time in petition for rehearing). In this case, the petition for rehearing contained arguments that had been briefed and addressed by the supreme court--for example, whether the trial court erred in sentencing the defendant without the benefit of a presentence investigation report. The petition also contained an argument that had not been briefed or decided by the supreme court-whether the jury was erroneously instructed about

> mitigating circumstances. Thus, claims that were both procedural appropriate and inappropriate were raised in the petition.
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> The supreme court summarily denied the petition for rehearing. We read that denial to mean that the supreme court considered the merits of the claims that were properly before it and, in effect dismissed the jury instruction claim because petitioner failed to comply with the governing rule of appellate procedure; consequently, the court never reached the merits of his jury instruction claim. In essence, petitioner sought another round of appellate review, and the Supreme Court of Florida properly declined to grant that unsanctioned opportunity. We therefore conclude that petitioner committed state procedural default and has foreclosed his right to federal review of his jury instruction claim. . . .

Hargrave v. Wainwright, 804 F.2d at 1187-88. (footnotes omitted).

While a majority, but not all of the judges of this Court might have been inclined to accept the panel's analysis in this regard, a recent case of the Florida

Supreme Court raises a serious doubt as to whether it would now hold there to be a procedural default under the circumstances of this case. Riley v. Wainwright, 12 F.L.W. 457 (Fla. Sept. 3, 1987). The Florida court there held that petitioner Riley, sentenced to death in a pre-Lockett trial, was not procedurally barred from presenting his Lockett claim in state habeas corpus proceedings where the issue had not been previously litigated on direct appeal or in the petitioner's first post-conviction challenge to the sentence.

The change in Florida's practice as to asserting a procedural default in cases like this raises the question of the position of the federal court in a case where the Florida courts had enforced a procedural default, but under later law would not.

It is not necessary to address this issue here, however, because, unlike the panel, we hold that Hargrave has shown cause for default and actual prejudice sufficient to require a federal review of his constitutional claim on the merits, pursuant to the principles established in Engle v. Isaac, 456 U.S. 107 (1982) and Wainwright v. Sykes, 433 U.S. 71 (1977).

In Reed v. Ross, 468 U.S. 1, 16 (1984), the Supreme Court held "that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with acceptable state procedures." In order to establish the novelty of a constitutional claim sufficient to provide cause, a defendant must initially demonstrate that his situation is one where a court has "articulated a constitutional

principle that has not been previously recognized but which has been held to have retroactive application". Id. at 17.

Hargrave was sentenced to death in 1975. Two years later, the Supreme Court held that under the Eighth and Fourteenth Amendments, a sentencer may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death". Lockett v. Ohio, 438 U.S. 586, 604 (1978). Lockett is the articulation of a constitutional principle that had not been previously recognized by the Supreme Court and this Court has concluded that it is to be retroactively applied. Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985) (in banc), cert. denied, 107 S.Ct. 1982 (1987).

A new retroactive decision must be a sufficiently "clear break with the past", so that an attorney representing the defendant would not reasonably have had the tools for presenting the claim in the state courts. Reed v. Ross, 468 U.S. at 17.

The panel held that Lockett was not such a clear break from past precedent, but rather was the product of evolving capital punishment law, following logically from earlier Supreme Court decisions. It appears now, however, that Lockett was such a change in the law, and that a successful claim based on exclusion of non-statutory mitigating circumstances was unavailable under federal and Florida law preceding Lockett. While the law was "open" in the sense that no statute or court decision directly foreclosed a Lockett challenge when Hargrave was sentenced and during the pendency of his direct appeal, there is

little in the relevant case law to suggest that such a claim would have viability.

A review of the federal law available to Hargrave's attorney during trial and direct appeal leads first to Proffitt v. Florida, 428 U.S. 242 (1976), a case handed down during the pendency of Hargrave's appeal. In Proffitt, the Supreme Court upheld Florida's death penalty statute and, in so doing, the Court squarely held that a sentencer could not consider non-statutory aggravating circumstances. Proffitt, however, did not suggest that a limitation on mitigating circumstances might be unconstitutional.

Indeed, in Proffitt, the Court stated that the decision whether to impose the death penalty "turned upon whether certain statutory aggravating circumstances surrounding the crime outweighed any statutory mitigating circumstances found to

exist". 428 U.S. at 246. Later, the Court stated that the "trial judge is . . . directed to weight the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed". Id. at 250. Also, the Court described the trial court's function as that of weighing "eight aggravating factors against seven mitigating factors". Id. at 251.

In short, Proffitt contains no direct statement or inference that, as a matter of federal constitutional law, the statutory list of mitigating circumstances should be considered nonexclusive. Proffitt's companion cases shed no light on this issue, see, e.g., Woodson v. North Carolina, 428 U.S. 280 (1976), and there is a dearth of federal cases decided prior to or during Hargrave's trial and appeal which address Florida's post-Furman capital

statute. It is thus fair to state that, at the time of Hargrave's trial and appeal, there were no federal decisions which should have alerted Hargrave's attorney to the possibility of a challenge based on exclusion of non-statutory mitigating circumstances.

Nor should Hargrave's attorney have been alerted to the possibility of a Lockett claim by decisions from the Florida courts. In State v. Dixon, 283 So.2d 1, cert. denied, 416 U.S. 943 (1974), the Florida Supreme Court did not explicitly state that the statutory list was exclusive but it treated the statutory mitigating circumstances as if they were the only factors which could be considered. After Dixon, the Florida courts continued to treat the statutory list of mitigating factors as exclusive without explicitly so holding. See, e.g., Alford v. State, 307

So.2d 433, 444 (Fla. 1975), cert. denied, 428 U.S. 912 (1976); Songer v. State, 322 So.2d 481, 484 (Fla. 1975), vacated on other grounds, 430 U.S. 952 (1977).

Finally, in Cooper v. State, 336 So.2d 1133 (1976), cert. denied, 431 U.S. 925 (1977), decided during the pendency of Hargrave's appeal, the Supreme Court of Florida seemed to make explicit the exclusivity of the statutory mitigating factors suggested by Dixon, Alford and Songer. The Supreme Court of Florida stated that the only factors relevant to sentencing under the Florida statute were the statutory aggravating and mitigating circumstances:

> The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding any more than purely speculative matters

> calculated to influence the sentence through emotional appeal. Such evidence threatens the proceeding with the undisciplined discretion condemned in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

336 So.2d at 1139 (footnote omitted).

The court in Cooper accompanied the text above with the following footnote:

> The legislative intent to avoid condemned arbitrariness pervades the statute. Section 921.141(2) requires the jury to render its advisory sentence "upon the following matters: (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6); (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist . . ." (Emphasis added). This limitation is repeated in Section 921.141(3), governing the trial court's decision on the penalty. Both sections 921.141 (6) and 921.141(7) begin with words of mandatory limitation. This may appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether operating for or against the death penalty.

336 So.2d at 1139 n.7 (emphasis in original). The court went on to hold:

> In any event, the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of the death penalty for "the most aggravated and unmitigated of serious crimes", and we are not free to expand the list.

336 So.2d at 1139 (footnote omitted).

After Lockett, the Florida Supreme Court in explaining its prior decisions, appeared to modify its earlier rulings regarding the exclusivity of the statutory factors. It concluded that the introduction of non-statutory mitigating evidence had never been precluded in Florida. Songer v. State, 365 So.2d 696, 700 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). That court has acknowledged, however, that its law could have been misconstrued.

In light of these developments in the law, both state and federal, this Court has previously recognized the practical unavailability of a Lockett claim at the very time at issue in this case. This Court has described Lockett as a "direct reversal" of Florida mitigating circumstances law, Ford v. Strickland, 707 F.2d 1339, 1347 (11th Cir. 1983), cert. denied, 466 U.S. 933 (1984); see Sullivan v. Wainwright, 695 F.2d 1306, 1311 (11th Cir.), cert. denied, 464 U.S. 922 (1983).

At the time Hargrave filed his appellate brief in state court, Cooper was prevailing precedent. As this Court has noted on several occasions, Cooper could be construed to be directly contrary to the United States Supreme Court's later decision in Lockett. See Proffitt v. Wainwright, 685 F.2d 1227, 1238 n.18 (11th Cir. 1982), cert. denied, 464 U.S. 1002

(1983); Ford v. Strickland, 696 F.2d 804, 812 (11th Cir.) (in banc), cert. denied, 464 U.S. 865 (1983). Since Hargrave "lacked the tools to construct [his] constitutional claim", Engle, 456 U.S. at 133, his failure to object to the judge's consideration only of statutory mitigating circumstances at the sentencing hearing and on appeal to the Florida Supreme Court must be excused. We thus conclude that Hargrave had cause for his default.

We also hold that Hargrave would suffer actual prejudice if his Lockett claim were found to be procedurally barred. The State argues that Hargrave cannot establish prejudice because claims such as his have been rejected many times by this Court, citing Johnson v. Wainwright, 806 F.2d 1479 (11th Cir. 1986); Straight v. Wainwright, 772 F.2d 674 (11th Cir. 1985), cert. denied, 106 S.Ct. 1502 (1986); Songer v.

Wainwright, 769 F.2d 1488 (11th Cir. 1985) (in banc), cert. denied, 107 S.Ct. 1982 (1987); Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985), cert. denied, 106 S.Ct. 1241 (1986); Francois v. Wainwright, 763 F.2d 1188 (11th Cir. 1985); Palmes v. Wainwright, 725 F.2d 1511 (11th Cir.), cert. denied, 469 U.S. 873 (1984); Alvord v. Wainwright, 725 F.2d 1282 (11th Cir.), cert. denied, 469 U.S. 956 (1984); Dobbert v. Strickland, 718 F.2d 1518 (11th Cir. 1983), cert. denied, 468 U.S. 1220 (1984); Shriner v. Wainwright, 715 F.2d 1452 (11th Cir. 1983), cert. denied, 465 U.S. 1051 (1984); Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983), cert. denied, 466 U.S. 993 (1984); Antone v. Strickland, 706 F.2d 1534 (11th Cir. 1983); Booker v. Wainwright, 703 F.2d 1251 (11th Cir.), cert. denied, 464 U.S. 922 (1983); Ford v. Strickland, 696 F.2d 804 (11th Cir.) (in banc), cert. denied, 464 U.S. 865 (1983).

Since these decisions were rendered, however, the United States Supreme Court handed down its decision in Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). In this case, the Supreme Court overturned a death sentence imposed on a Florida defendant based on a Lockett claim similar to Hargrave's. Hitchcock has breathed new vitality into claims based on the exclusion of non-statutory mitigating factors, and Hargrave would be prejudiced if he were not allowed to now raise such a claim.

Hargrave is thus entitled to have his Lockett claim heard on the merits. The outcome of a pre-Lockett case concerning a Lockett claim should be determined by matching the record in the case under consideration with the Hitchcock record. Indeed, this is the method the Florida Supreme Court has used to set aside a death sentence previously affirmed on a Lockett

claim. Thompson v. Dugger, 12 F.L.W. 469 (Fla. Sept. 9, 1987) (granting relief on Lockett claim after denial of relief affirmed in both Thompson v. State, 410 So.2d 500 (Fla. 1982) and Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), cert. denied, 107 S.Ct. 1986 (1987)).

Looking at the record in the instant case, it is clear that this case is so similar to Hitchcock that the cases must reach the same result.

The Court in Hitchcock held that the record reflected a Lockett violation because:

> The members of the jury were told by the trial judge that he would instruction them 'on the factors in aggravation and mitigation that you may consider under our law.' . . . He then instructed them that "[t]he mitigating circumstances which you may consider shall be the following. . . .' (listing the statutory mitigating circumstances).

107 S.Ct. at 1824 (citations omitted).

In Hargrave as in Hitchcock, some evidence in mitigation which did not fit within the confines of the Florida Statute, such as a petitioner's steady employment, below-average intelligence, and history of drug abuse, was introduced at the sentencing hearing. Two expert witnesses who testified at the hearing, while differing as to whether petitioner's mental condition satisfied the statutory mitigating circumstances, did agree that petitioner suffered from a significant degree of mental and emotional impairment.

The trial court in this case, as in Hitchcock, instructed the jury that "[t]he mitigating circumstances which you may consider, if established by the evidence, are as follows. . . .", whereupon the court read the mitigating circumstances in the statutory language.

The Supreme Court in Hitchcock further noted that the trial judge, in imposing sentence, expressly weighed only those mitigating factors enumerated in the death penalty statute:

> [T]he sentencing judge found that 'there [were] insufficient mitigating circumstanes as enumerated in Florida Statute 921.141(6) to outweigh the aggravating circumstances'. He described the process by which he reached his sentencing judgment as follows: 'In determining whether the defendant should be sentenced to death or life imprisonment, this Court is mandated to apply the facts to certain enumerated "aggravating" and "mitigating" circumstances.'

107 S.Ct. at 1824. (record citations omitted; emphasis in original).

Based upon these facts, the Court held that the sentencing proceeding in Hitchcock had not complied with the Lockett mandate:

> We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory

> mitigating circumstances, and that the proceedings therefore did not comport with the requirements of Skipper v. South Carolina, 476 U.S. _____ (1986), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion).

Id.

The instruction in Hitchcock is similar to the judge's instruction during jury selection in Hargrave. The trial court in Hargrave described its role as follows:

> The law sets forth certain factors which the jury must take into consideration, and at that stage of the proceedings, the court supplies the jury orally and in writing with what are called aggravating circumstances which are listed in the law and mitigating circumstances, certain other circumstances that are listed in the law. (Emphasis supplied).

At the conclusion of the penalty phase of the trial, the court instructed the jury that "[y]our verdict must be based upon your finding of whether sufficient

aggravating circumstances exist which outweigh any mitigating circumstances found to exist".

There is other evidence in this case that the jury and sentencing judge limited their consideration of mitigating circumstances to those enumerated in the statute. When counsel for Hargrave requested a presentence investigation after the jury returned its death recommendation, the court, while deferring its ruling, noted that "there is very little if any of the ordinary presentence report that would be relevant to what the jury and the Court are supposed to consider in this matter concerning mitigating and aggravating circumstances". In response to counsel's subsequent request at sentencing for a presentence report, the prosecutor argued that the court "was bound by the criteria outline in the statute as to the

aggravating and mitigating circumstances", and that a presentence investigation "would not serve any purpose, because I don't believe the Court can go outside of those criteria". The court accepted this argument, ruling it could consider only "certain factors" in sentencing petitioner, as to which a presentence report would be irrelevant.

The court rejected the applicability of Section 921.141(f) of the Florida Statutes which provided as a mitigating circumstance that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired". The court found that the evidence established only "impairment" which did not satisfy the statutory standard:

> . . .[A]lthough there is some evidence of a personality defect in the defendant and some possibility of an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, the Court finds that such capacity was not substantially impaired . . . It may be, as alleged by the defense, that there could be some doubt as to whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired to some degree. There is no doubt that the defendant has a history of mental abnormalities which may yet be affecting the defendant; however, it is the finding of the Court that such abnormalities only constitute a personality defect. A great number, possibly a majority of all persons who commit crimes, also have this or a similar type of personality defect. (Emphasis added).

The court stated its belief that the Florida Statued had established "certain standards to be considered by the jury and the Court", and that "the object of it was to eliminate as much as possible the

individualistic characteristics and personalitites of the various defendants . . . so that the jury and the Court would render an opinion and finding that was based upon standards".

The Florida Supreme Court in its review of the trial court decision indicated that the trial judge was limited to those mitigating circumstances enumerated in the statute. The court stated:

> It is apparent, then, that the trial judge did not ignore or fail to consider the psychological evidence bearing on mitigation. Obviously, he and the jury were not persuaded that it provided a sound basis for establishment of the statutory mitigating circumstances.

Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert., denied, 444 U.S. 919 (1979).

The totality of the circumstances reflect that as in Hitchcock, Hargrave's sentencing proceedings did not comport with Skipper v. South Carolina, 106 S.Ct. 1669

(1986), Eddings v. Oklahoma, 455 U.S. 104 (1982) and Lockett v. Ohio, 438 U.S. 586 (1978). We therefore reverse and remand to the district court with instructions to enter an order granting the application for a writ of habeas corpus, unless the State within a reasonable period of time either resentences Hargrave in a proceeding that comports with the requirements of Lockett or vacates the death sentence and imposes a lesser sentence consistent with law. See Hitchcock, 107 S.Ct. at ____.

REVERSED AND REMANDED.

TJOFLAT, Circuit Judge, specially concurring:

After the panel issued its opinion in this case, the Supreme Court rendered its decision in Hitchcock v. Dugger, ____ U.S. _____, 107 S.Ct. 1821 (1987). I agree with the majority that the petitioner has established a Lockett violation under Hitchcock. However, I write separately for two reasons. First, I am concerned that Hitchcock is susceptible to a misreading that would work a drastic change in the way we approach state procedural default issues in habeas cases. Second, I disagree with the analysis the majority uses to reach the merits of the Lockett claim.

I.

Hitchcock, like the present case, involved a pre-Lockett death sentence under the Florida death penalty statute.[1] During the sentencing phase of Hitchcock's trial

before the advisory jury, Hitchcock's counsel presented evidence of both statutory and nonstatutory mitigating circumstances. At the conclusion of that phase, the court instructed the advisory jury that it could consider statutory mitigating circumstances, but did not instruct the jury whether it could consider nonstatutory mitigating circumstances. The jury recommended the death sentence, and the court accepted that recommendation. In imposing the death sentence, the court did not indicate in its findings whether it had considered nonstatutory mitigating circumstances. The court stated only that "there [were] insufficient mitigating circumstances as enumerated in Florida Statute 921.141(6) to outweigh the aggravating circumstances". At no time during the sentencing process did Hitchcock object to the court's treatment of nonstatutory mitigating circumstances.

In Florida, a defendant must make a contemporaneous objection to infirmities in the sentencing process in order to preserve the issue for appellate review.[2] In other words, a defendant who fails to make a contemporaneous objection has committed a state procedural default. For sound policy reasons, federal courts give effect to such state procedural defaults on habeas review.[3] Thus, if a habeas petitioner has committed state procedural default as to a particular objection, a federal court will not review the claim unless the petitioner establishes cause for the default and actual prejudice from the alleged constitutional violation. See Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977).

In Hitchcock, however, the Supreme Court reviewed the petitioner's Lockett claim notwithstanding his failure to make a

contemporaneous objection during the sentencing process. The Court did so without even mentioning the Sykes "cause and prejudice" standard. One might therefore conclude upon reading Hitchcock that we are now required in habeas cases to disregard state procedural default rules and to scrutinize the record in each case for plain error, at least with respect to Lockett claims involving pre-Lockett sentences. A close examination of the procedural history of Hitchcock reveals, however, that the Supreme Court's decision in that case requires no such departure from settled principles in this area.

Although Hitchcock's counsel made no contemporaneous objection to the sentencing judge's treatment of nonstatutory mitigating circumstances, Hitchcock argued on direct appeal that he had been improperly limited in presenting mitigating

evidence. Finding that this contention was without merit, the Florida Supreme Court stated that "[t]here is nothing in the record indicating that the trial judge limited the defense's presentation". Hitchcock v. State, 413 So.2d 741, 748 (Fla. 1982). Hitchcock then moved the trial judge to vacate the judgment and sentence under Fla. R. Crim. P. 3.850; the judge denied the motion and the supreme court affirmed. In its opinion affirming the denial of the motion to vacate, the supreme court elaborated upon precisely what matters it had considered in Hitchcock's direct appeal:

> [o]n direct appeal Hitchcock's counsel argued that presentation and consideration of mitigating evidence had been improperly limited and cited both Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978), and Cooper v. State, 336 So.2d 1133 (Fla. 1978), cert. denied, 431 U.S. 925, 97 S.Ct. 2200 (1977) . . . . The record conclusively demonstrates,

> therefore, that the limitation on mitigating evidence issue has been raised previously, has been fully considered, and has been found to be without merit.

Hitchcock v. State, 432 So.2d 42, 43 (Fla. 1983).

On direct appeal, then, the Florida Supreme Court had reviewed Hitchcock's Lockett claim notwithstanding his failure to object during the sentencing process to the judge's treatment of nonstatutory mitigating circumstances. Since the Florida Supreme Court would have otherwise applied the contemporaneous objection rule to bar consideration of Hitchcock's present challenge, we must infer that in this particular case the court elected to examine the record for plain error with respect to the Lockett claim.[4]

The Florida Supreme Court having thus passed on the constitutional issue, nothing in habeas corpus jurisprudence constrained

the United States Supreme Court from addressing the merits of that issue on habeas review. Procedural default simply was not an issue before the Supreme Court. It would therefore run counter to logic to conclude that the Supreme Court's review of Hitchcock's Lockett claim signals a departure from the treatment of state procedural default prescribed by Sykes. Thus, should the courts of a state elect to enforce a procedural default rule so as to foreclose review of Lockett claims, nothing in Hitchcock prevents a federal habeas court from vindicating such state court policy by applying the Sykes rationale.

II.

Although I agree that the petitioner has established a Lockett violation in light of Hitchcock, I disagree with the analysis the majority uses to reach the merits of the Lockett claim. The majority

concludes that "[w]hether or not there was a procedural default, we hold that Hargrave showed sufficient cause and prejudice to obtain review on the merits of his claim under Lockett v. Ohio." Ante at ___. In light of Florida Supreme court decisions rendered after the panel issued its opinion in this case, it has become clear to me that the Florida courts have decided that they will no longer apply procedural default to bar review of claims like those Hargrave has asserted. Rather than engage in a needless and unwarranted application of the cause and prejudice analysis, we should simply honor the determination of the Florida courts that their procedural default rule is not worthy of vindication in this class of cases and proceed directly to the merits of Hargrave's claim.

As the majority notes, this case was taken en banc principally to reconsider the

panel's holding that Hargrave had committed state procedural default with respect to his Lockett claim. Because I believe that the analysis of this case properly turns on resolution of that issue, I feel that it is appropriate to review the panel's opinion and subsequent developments pertinent to the procedural default question.

In his appeal from the federal district court's denial of his petition for writ of habeas corpus, Hargrave presented a three-part Lockett claim. He argued that his eighth amendment right against cruel and unusual punishment had been violated because (1) the advisory jury that recommended his death sentence had not been instructed that it could consider nonstatutory mitigating factors, (2) his counsel believed that he was limited to presenting nonstatutory mitigating evidence at the sentencing proceedings, and (3) the

sentencing judge and Florida Supreme Court had not fully considered nonstatutory mitigating circumstances.

The panel concluded that Hargrave had committed state procedural defaults as to all three components of his claim. Hargrave v. Wainwright, 804 F.2d 1182, 1187-89 (11th Cir. 1986). Hargrave had raised the jury instruction claim for the first time in a petition for rehearing, which the Florida Supreme Court summarily denied. Noting that Florida appellate rules prohibited consideration of issues raised for the first time in a petition for rehearing,[5] the panel inferred that the jury instruction claim had been dismissed on procedural default grounds.

The second and third components of Hargrave's Lockett claim were first raised in a supplemental brief filed in connection with Hargrave's direct appeal from his

conviction and sentence. In affirming the conviction and sentence, the Florida Supreme Court neither acknowledged nor addressed the arguments raised in the supplemental brief. Noting that Florida appellate rules disallowed submission of supplemental briefs "except by special order of the appellate court",[6] and that the supreme court had not entered a special order permitting Hargrave to submit a supplemental brief, the panel inferred that the supreme court had regarded the brief as a nullity and had not considered the claims contained therein in its disposition of the direct appeal. The claims were later included, along with the jury instruction claim, in the petition for rehearing which the supreme court summarily denied. The panel concluded that those claims, like the jury instruction claim, had been rejected on procedural default grounds.

Having found a state procedural default as to all three components of Hargrave's Lockett claim, the panel then applied the test for determining whether Hargrave had thereby foreclosed his right to federal habeas review. Under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977), and Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639 (1986), one who commits state procedural default will not be accorded federal habeas review unless he can show cause for the default and actual prejudice resulting from the alleged constitutional violation. Relying on Reed v. Ross, 468 U.S. 1, 16, 104 S.Ct. 2901, 2910 (1984), which holds that cause exists "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel", Hargrave argued before the panel that he had cause for the default because Lockett v. Ohio, 438 U.S. 586, 98 S.Ct.

2954 (1978), the case upon which he based his constitutional challenge, had not been decided until three years after his trial. The panel rejected this argument, finding that the state of the law at the time of Hargrave's trial and appeal offered a reasonable basis upon which to make the constitutional challenge. Having thus concluded that cause was absent, the panel did not reach the prejudice issue, and it affirmed the district court's denial of Hargrave's petition for writ of habeas corpus.

After the panel issued its opinion and while rehearing en banc was pending, the Florida Supreme Court decided a series of cases in which individuals sentenced under the Florida death penalty statute had collaterally attacked their sentences alleging Lockett violations. See Thompson v. Dugger, Nos. 70,739 & 70,781 (Fla. Sept.

9, 1987); Downs v. Dugger, No. 71,100 (Fla. Sept. 9, 1987); Riley v. Wainwright, No. 69,563 (Fla. Sept. 3, 1987); McCrae v. Florida, No. 67,629 (Fla. June 18, 1987). In each of these cases, the Florida Supreme Court reached the merits of the petitioner's Lockett claim, notwithstanding the petitioner's failure to raise the claim on direct appeal.[7] With respect to this narrow class of Lockett claims, then, it has become clear to me that the Florida Supreme Court will not apply procedural default to bar collateral review in state court.

In federal habeas cases where a state court has in a prior proceeding entertained a constitutional claim notwithstanding the petitioner's commission of a procedural default, we have disregarded the default and proceeded directly to the merits of the particular case. See Campbell v.

Wainwright, 738 F.2d 1573, 1576-77 (11th Cir. 1984), cert. denied, _____ U.S. _____, 106 S.Ct. 1652 (1986); Rogers v. McMullen, 673 F.2d 1185, 1188 (11th Cir. 1982), cert. denied, 459 U.S. 1110, 103 S.Ct. 740 (1983); see also Dobbert v. Strickland, 718 F.2d 1518, 1524 (11th Cir. 1983), cert. denied, 468 U.S. 1220, 104 S.Ct. 3591 (1984). That approach makes eminent sense in light of the underlying rationale for applying state procedural default rules in federal habeas proceedings. Such rules are applied out of respect for the integrity of the state court system. See Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639 (1986). We show no disrespect by disregarding a procedural default rule when that rule has not been enforced in state court, for "[w]hen a state court decides a constitutional question, even though it does not have to, it necessarily holds that

the policies underpinning its procedural rule are unworthy of vindication under the particular circumstances of the case before it". Cooper v. Wainwright, 807 F.2d 881, 886-87 (11th Cir. 1986), cert. denied, _____ U.S. _____, 107 S.Ct. 2183 (1987).

I see no reason for taking a different approach in this case. Although the Florida attorney general argued in his brief that federal habeas review was barred on procedural default grounds, the Florida Supreme Court has since clearly indicated that it does not want its procedural default rule enforced so as to defeat review of Lockett claims. The state supreme court, not the attorney general, is the authoritative speaker for the interests of the state court system. See Darden v. Wainwright, 725 F.2d 1526 (11th Cir.) (an banc) (Tjoflat, J., dissenting), cert.

denied, 467 U.S. 1230, 104 S.Ct. 2688 (1984). As the Supreme Court has stated, "if . . . the state courts [do not] indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim". County Court of Ulster County v. Allen, 442 U.S. 140, 154, 99 S.Ct. 2213, 2223 (1979). Therefore, since the Florida courts have affirmatively indicated that they will not apply procedural default to Lockett claims, we would show no disrespect by proceeding directly to the merits of Hargrave's claim.

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[1] These claims arise because Lockett has retroactive application. See Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc), cert. denied, _____, U.S. ____, 107 S.Ct. 1982 (1987).

[2] Florida courts have consistently held that errors are waived unless timely raised in the trial court. See e.g., Clark v. State, 363 So.2d 331, 333 (Fla. 1978). The Florida Rules of Criminal Procedure specifically provide that "[n]o party may assign as error grounds of appeal the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict". Fla.R.Crim.P. 3.390(d) (1975).

Florida appellate courts do not apply the contemporaneous objection rule where the sentencing court has failed to comply with statutory sentencing guidelines. See State v. Rhoden, 448 So.2d 1013 (Fla. 1984). This exception to the contemporaneous objection rule is not relevant here, since the court fully complied with the statutory sentencing requirements.

[3] State procedural rules serve several salutary purposes. Among other things, they "enable the state trial and appellate courts to deal with a litigant's objections at the most ideal moment, when the issue is fresh and the least onerous and costly remedy is available". Blake v. Kemp, 758 F.2d 523, 547 (11th Cir. 1985) (Tjoflat, J., dissenting).

[4] Florida courts will not enforce the contemporary objection rule if they notice "fundamental error". See Clark v. State. 363 So.2d 331, 333 (Fla. 1978). Fundamental error is "error which goes to the foundation of the case or goes to the merits of the cause of action". Id.

[5] Fla. App. Rule 3.14(b) (1962). See Delmonico v. State, 155 So.2d 368, 369 (Fla. 1963); Leslie Bros. v. Roope, 108 Fla. 189, 148 So. 212, 212 (1933); Price Wise Buying Group v. Nuzum, 343 so.2d 115, 117 (Fla. Dist. Ct. App. 1977).

[6] Fla. App. Rule 3.7(d) (1962).

[7] The supreme court has apparently concluded that it is required by United States Supreme Court's decision in Hitchcock to entertain these claims. The supreme court seems to have concluded that Hitchcock forecloses application of Florida's procedural default rules to this class of claims. Apparently, the supreme court has adopted the misreading of Hitchcock to which I averted in part I of this opinion. For purposes of determining whether we should proceed directly to the merits of the Lockett claim in this case, however, it does not matter why the Florida courts have decided not to enforce their procedural default rules in this class of cases; it only matters that they have in fact clearly make the decision to do so.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5102

LENSON A. HARGRAVE,

Petitioner-Appellant,

v.

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections, State of Florida,

Respondent-Appellee.

Appeal from the United States District
Court for the Southern District of
Florida

(November 3, 1986)

Before TJOFLAT and VANCE, Circuit Judges,
and ATKINS*, Senior District Judge.

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*Honorable C. Clyde Atkins, Senior U.S.
District Judge for the Southern District of
Florida, sitting in designation.

TJOFLAT, Circuit Judge:

Petitioner, Lenson A. Hargrave, who was found guilty of first degree murder by a Florida jury and sentenced to death, presents three issues in this appeal from a federal district court's denial of his petition for writ of habeas corpus: (1) whether petitioner's eighth amendment right against cruel and unusual punishment was violated (a) because the jury was not instructed that it could consider nonstatutory mitigating factors when rendering an advisory sentence, (b) because petitioner's counsel believed that he was limited to the presentation of statutory mitigating evidence at the sentencing hearing, and (c) because the sentencing judge and the Supreme Court of Florida did not fully consider nonstatutory mitigating circumstances; (2) whether the State's introduction at the trial's sentencing

phase of the testimony of a psychologist appointed by the court at petitioner's request violated petitioner's fifth amendment right against compelled self-incrimination and sixth amendment right to counsel, even though petitioner did not contemporaneously object; and (3) whether Fla. Stat. 921.141(5)(h) (1975), which defines a killing that is "especially heinous, atrocious, or cruel", as an aggravating circumstance, was applied in an unconstitutionally vague manner in violation of the eighth amendment. We conclude that the district court properly disposed of each of these issues and thus affirm.

I.

A.

Sometime in mid-May 1974, petitioner and his friend, Lawrence Karge, planned the robbery of a U-Tote-M convenience store in

Miami, Florida.[1] Karge was a former employee of the store and was familiar with the store's alarm system. In the early evening of May 17, petitioner entered the store alone. He approached the clerk, Joseph Jones, who was the only other person in the store. Petitioner pulled out a gun and told Jones it was a holdup. Jones raised his hands, and petitioner told him to hand over the money in the cash register. Jones tried to comply but could not, because the cash register was jammed. Petitioner stepped backward and told Jones, "Open it up". Jones replied "I can't. It's jammed. I can't". Then petitioner fired two shots at Jones; one missed, but the other hit Jones in the chest. Jones gasped and fell backwards to the floor. Petitioner walked behind the counter and tried, unsuccessfully, to open the register. As petitioner was walking

back toward the front of the counter, a man entered the store and asked petitioner if the store carried pickled pigs' feet. Petitioner replied, "No, we don't. We're out of them right now". After the man walked out of the store, got into his car, and drove off, petitioner walked around to the front of the counter and shot Jones in the head.

Petitioner then left the store and walked to the parking lot of a nearby bar to wait for Karge, who arrived about two minutes later and drove petitioner home. After eating dinner and changing his clothes, petitioner left for his job as a night security guard for a shopping center.

About seven months later, petitioner was arrested for the murder of Joseph Jones. At the stationhouse following his arrest, petitioner waived his Miranda rights and signed a statement, confessing

to the killing and identifying the location of the murder weapon.

B.

Before trial, defense counsel informed the court that he doubted petitioner's competency to stand trial and his sanity at the time of the offense and moved the court for the appointment of one or more experts to examine petitioner.[2] The court appointed three experts, two psychiatrists and a psychologist, all of whom determined that petitioner was competent to stand trial and had been sane at the time of the Jones murder.[3]

Petitioner's trial began on July 10, 1975.[4] The guilt/innocence phase of the trial took five days and resulted in a jury verdict of first degree murder.[5] The sentencing phase of the trial began shortly after the jury returned its verdict and was completed the same day. The state called

three witnesses, one of the court-appointed psychologists and two lay witnesses. The psychologist described petitioner as a sociopath who had "a great deal of difficulty conforming to and adjusting to the mores or demands of society". He said that petitioner was insecure, apprehensive, and hostile. The psychologist also said that petitioner, who was nineteen at the time of the examination, had "a mental age of sixteen to seventeen" and had a history of using drugs, mostly marijuana. The two lay witnesses testified that, prior to petitioner's arrest, he said that he had killed someone before and it would not bother him to kill again. The defense called one of the court-appointed psychiatrists and petitioner's mother. The psychiatrist testified that petitioner had an "anti-social personality", acted impulsively, and could easily be used by

other persons. Petitioner's mother stated that petitioner had been under Karge's influence for a long time. The jury recommended the imposition of the death penalty.

On July 18, 1975, the trial court convened a hearing to sentence petitioner. The court heard testimony from petitioner's mother and grandmother (who corroborated the mother's trial testimony), petitioner's allocution, and argument from counsel for the State and petitioner. The court found that four aggravating circumstances attended the Jones murder: (1) the murder was committed while the petitioner was attempting to commit a robbery; (2) the murder was committed "for the purpose of avoiding or preventing a lawful arrest"; (3) the murder was committed for pecuniary gain; and (4) the murder was "especially heinous, atrocious

or cruel, in that, after initially shooting the victim and while the victim lay helplessly bleeding on the floor, the [petitioner] deliberately leaned over the counter and shot the victim in the head". The court found two mitigating circumstances: (1) petitioner had "no significant history of criminal activity"; and (2) petitioner's age--eighteen years. The court balanced the factors and agreed with the jury that the aggravating circumstances outweighed the mitigating circumstances. Accordingly, the court imposed the death penalty.

Petitioner unsuccessfully appealed his conviction to the Supreme Court of Florida.[6] Hargrave v. State, 366 So.2d 1 (Fla. 1978) (per curiam), cert. denied, 444 U.S. 919, 100 S.Ct. 239 (1979). He then filed a motion in the trial court to vacate the judgment and sentence under

Fla.R.Crim.P. 3.850 (1977).[7] This motion was denied, and the Supreme Court of Florida affirmed the denial. Hargrave v. State, 396 So.2d 1127 (Fla. 1981) (per curiam). Petitioner filed a second post-conviction motion in the trial court,[8] which also was denied. The Supreme Court of Florida affirmed the denial. Hargrave v. State, 427 So.2d 713 (Fla. 1983). Having exhausted his state remedies, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Florida. The district court, following a hearing, denied his petition. He then took this appeal.

II.

Petitioner claims that he was denied his eighth amendment right against cruel and unusual punishment because certain mitigating evidence was not considered by

the jury, the trial court, or the Supreme Court of Florida. There are several components to petitioner's claim. First, petitioner argues that although his counsel did not offer any nonstatutory mitigating evidence, to the extent that such evidence was elicited at trial--for example, petitioner's steady employment, below average intelligence, and history of drug use--the court prevented the jury from considering that evidence because of its limiting instructions.[9] Second, he contends that his trial counsel believed that the presentation of mitigating evidence at the sentencing phase of the trial was limited to evidence of statutory mitigating circumstances. Finally, petitioner contends that the trial court, when sentencing petitioner, considered only statutory mitigating circumstances and that both the trial court and the state supreme

court did not accord any mitigatory weight to evidence of petitioner's below average intelligence, simply because they found that the statutory requirement of "substantial [mental] impairment" was not met. Each component of petitioner's claim is rooted in Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65 (1978) (plurality), which held that the eighth and fourteenth amendments require that a sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death". (Footnote omitted).

Before we can address a habeas corpus petitioner's federal constitutional claim, we must first determine if that claim is properly before us. We begin by examining

the procedural history of petitioner's jury instruction argument.

A.

Petitioner did not object to the court's jury instructions on mitigating circumstances at trial.[10] Nor did petitioner object to those instructions on direct appeal to the Supreme Court of Florida. No objection was made, in fact, until after the supreme court issued its opinion affirming petitioner's conviction and sentence; the petitioner raised the issue for the first time in a petition for rehearing.

At the time of petitioner's appeal, Rule 3.14(b) of the Florida Appellate Rules (1962) governed the contents of a petition for rehearing: "The petition for rehearing shall not assume a new ground or position from that taken in the original argument or briefs upon which the cause was submitted .

. ." Thus, an argument could not have been raised for the first time in a petition for rehearing. See Delmonico v. State, 155 So.2d 368 (1963) (initial presentation of matter on rehearing was improper) (footnote omitted); Leslie Bros v. Roope, 108 Fla. 289, 148 So. 212 (1933) (supreme court will not on petition for rehearing after affirmance reopen case to permit presentation of different theory from that adopted below); Price Wise Buying Group v. Nuzum, 343 So.2d 115, 117 (Fla. Dist. Ct. App. 1977) (appellate court would not consider an issue raised for first time in petition for rehearing). In this case, the petition for rehearing contained arguments that had been briefed and addressed by the supreme court--for example, whether the trial court erred in sentencing the defendant without the benefit of a presentence investigation report. The

petition also contained an argument that had not been briefed or decided by the supreme court--whether the jury was erroneously instructed about mitigating circumstances. Thus, claims that were both procedurally appropriate and inappropriate were raised in the petition.

The supreme court summarily denied the petition for rehearing. We read that denial to mean that the supreme court considered the merits of the claims that were properly before it and, in effect, dismissed the jury instruction claim because petitioner failed to comply with the governing rule of appellate procedure; consequently, the court never reached the merits of his jury instruction claim. In essence, petitioner sought another round of appellate review, and the Supreme Court of Florida properly declined to grant that unsanctioned opportunity.[11] We therefore

conclude that petitioner committed state procedural default and has foreclosed his right to federal review of his jury instruction claim, unless he can show cause for the default and actual prejudice resulting from the alleged constitutional violation. See Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558 (1982); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977).

B.

The second and third components of petitioner's mitigating evidence argument--his trial counsel incorrectly assumed that mitigating circumstances were limited to those listed in the statute and the trial court, in sentencing petitioner, considered only statutory mitigating evidence--were first raised after briefs were filed and oral argument was heard on direct appeal before the Supreme Court of Florida. Petitioner made those arguments for the

first time more than a year and one-half after oral argument when he filed a supplemental brief, asking for a new hearing in order to present nonstatutory mitigating evidence. Ten days after petitioner filed his supplemental brief, the supreme court issued an opinion affirming petitioner's conviction and sentence; the arguments made in petitioner's supplemental brief were neither acknowledged nor addressed.

We cannot presume that the supreme court's silence indicates that it reached the merits of those arguments, because the Florida Appellate Rules made no provision for a "supplemental brief". The rule in force during petitioner's appeal provided for an appellant's main brief, an appellee's brief, and an appellant's reply brief, but for no other briefs or appendices "except by special order of the

appellate court". Fla. App. Rules 3.7(d) (1962). Moreover, that rule states that "[s]uch assignments of error as are not argued in the briefs will be deemed abandoned and may not be argued orally". Fla. App. Rules 3.7(i) (1962). In short, the Florida Appellate Rules made no provision for supplemental briefing of abandoned claims.

In this case, petitioner wished to raise certain claims that he never addressed in his main brief[12] and never presented at oral argument. The Supreme Court of Florida did not issue a special order that would have allowed him to raise those claims. Petitioner's "supplemental brief" was thus a nullity.

After the supreme court issued its opinion, petitioner again raised his mitigating evidence arguments in his petition for rehearing. For the same

reasons given in our discussion of the jury instruction, we find that there was procedural default as to petitioner's contentions that his trial counsel incorrectly assumed that mitigating circumstances were limited to those listed in the statute and that the trial court (and thus the supreme court) considered only statutory mitigating evidence.[13] Because we have concluded that all three components of petitioner's mitigating evidence argument were procedurally barred in the state proceedings, we must next determine if there is "cause and prejudice" to advance petitioner's claim in this habeas corpus proceeding.

C.

Petitioner argues in his brief that he was excused from objecting at trial and on direct appeal because the law at that time indicated that only statutory mitigating

circumstances could be considered,[14] and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978) (plurality), upon which his constitutional claim is based, was decided more than three years after his trial.[15] In Reed v Ross, 468 U.S. 1, 16, 104 S.Ct. 2901, 2910 (1984), the Supreme Court held that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures". To determine whether the state of the law at the time of trial and appeal offered a reasonable basis upon which to make a constitutional challenge, the Court identified

> three situations in which a "new" constitutional rule, representing "a clear break with the past", might emerge from this Court. First, a decision of this Court may explicitly overrule one of our precedents. Second, a decision

> may "overtur[n] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved". And, finally, a decision may "disapprov[e] a practice this Court arguably has sanctioned in prior cases".

Id. at 17, 104 S.Ct. at 2911 (citations omitted). None of those situations identified by the Court cover the case before us. Lockett did not overrule Supreme Court precedent and was not contrary to a near-unanimous body of lower court authority. And Lockett did not disapprove a practice that the Supreme Court had arguably sanctioned in earlier cases. Rather, the rule in Lockett was the product of evolving capital punishment law and "followed from the earlier decisions of the [Supreme] Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all". Eddings v.

Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 875 (1982).

Moreover, at the time of petitioner's trial in 1975, the ambiguous wording of Florida's statute left open the question of whether under Florida law the presentation of mitigating circumstances was limited to those factors enumerated in the statute. Proffit v. Wainwright, 685 F.2d 1227, 1238 (11th Cir. 1982), cert. denied, 464 U.S. 1002, 104 S.Ct. 508 (1983).[16] And although the Supreme Court of Florida has suggested that mitigating circumstances were limited to those found in the statute,[17] it did not address the scope of admissible evidence until after it issued its opinion in petitioner's direct appeal.[18] In light of the evolving nature of capital sentencing law due to the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972) (per curiam) (plurality), and

the uncertain meaning attached to Florida's new capital sentencing statute, [19] we find no "cause" for petitioner's failure to object at trial or on direct appeal. Clearly there was a reasonable basis in 1975 upon which petitioner could have made the constitutional challenge he wishes to make today. We note further that, even if petitioner's perception of state law had been reasonable, the "futility of presenting an objection to the state courts cannot alone constitute cause for failure to object at trial". Engle v. Isaac, 456 U.S. 107, 130, 102 S.Ct. 1558, 1573 (1982); see also Antone v. Strickland, 706 F.2d 1534, 1537 (11th Cir.), cert. denied, 464 U.S. 1003, 104 S.Ct. 511 (1983). Because petitioner has failed to show cause for the procedural default of his Lockett claim, we are barred by Wainwright v. Sykes, from considering the merits of that claim.[20]

III.

Petitioner next claims that the State, contrary to the fifth and fourteenth amendments, violated his right against self-incrimination. Petitioner argues that testimony by Dr. Robert W. Sylvester during the penalty phase of the trial violated his rights under Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981), because Dr. Sylvester's testimony was based upon a competency examination during which petitioner received no Miranda warnings.[21] We find Smith distinguishable and conclude that its underlying rationale does not apply in this case.

In Smith, the trial judge ordered sua sponte that the defendant be given a psychiatric examination to determine his competency to stand trial. The defendant was found to be competent and was subsequently convicted of a capital

crime. At the penalty stage of his bifurcated trial, the State offered the testimony of the court-appointed psychiatrist who had examined the defendant. The psychiatrist testified that, based on the information he collected during the competency interview, he believed that the defendant would always be dangerous. Relying on this testimony the jury answered special interrogatories in a manner that made the death penalty mandatory. See Smith, 451 U.S. at 456-60, 101 S.Ct. at 1870-71.

The Supreme Court granted certiorari on Smith's petition for habeas corpus and held that the State's use of the doctor's testimony had violated the fifth, sixth, and fourteenth amendments. The Court found the situation at issue to be analogous to that in Miranda and thus ruled that Smith should have received Miranda warnings

before speaking with the psychiatrist. Id. at 466-69, 101 S.Ct. at 1875-76. The Court further ruled that, under the sixth and fourteenth amendments, Smith's counsel should have been informed that the State could use the results of the examination in the penalty phase of the defendant's trial. Id. at 469-72, 101 S.Ct. at 1876-77.

After Smith, in Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981),[22] the former Fifth Circuit held that Smith was to be applied retroactively. The court further held that a defendant did not waive his right to Miranda warnings merely because he initiated the request for a competency hearing.

The Battie decision, which is binding upon us, makes it irrelevant that it was petitioner who requested the competency examination conducted by Dr. Sylvester.

Nevertheless, we find significant distinctions between the principle at issue in the present case and that in Smith. Upon reflection, we find that there is no constitutional error when the State introduces psychiatric or psychological evidence during the penalty stage of a bifurcated trial to counter other psychiatric or psychological evidence the defendant has announced he will proffer. See Smith, 451 U.S. at 472, 101 S.Ct. at 1878 ("[A] different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase.").

In Smith, the Court did not assert that the psychiatrist's testimony was inadmissible because it was based on the defendant's involuntary or coerced statements.[23] Instead, the Court was concerned more with the element of fairness

implicit in the fifth amendment, which prohibits a defendant "from being made the 'deluded instrument' of his own execution". Smith, 451 U.S. at 462, 101 S.Ct. at 1873. In the Court's view, the State clearly violated this fairness element when it introduced psychiatric testimony based on the defendant's own statements, given that the defendant "introduced no psychiatric evidence, nor had he indicated that he might do so". Id. at 466, 101 S.Ct. at 1874.

In the case before us, however, we are not faced with a situation where the State, even unintentionally, deceived petitioner. At the beginning of the penalty phase, petitioner stated that he intended to call a psychologist to testify on his behalf, presumably to establish mitigating circumstances. When the trial judge asked whether either side planned to

call Dr. Jarrett, and the State indicated that it did not, petitioner's counsel said "[t]hen the Defendant will".[24] Thus, before Dr. Sylvester began testifying, the State knew that the defense intended to present favorable psychological evidence.[25] Furthermore, petitioner made no contemporaneous objection to Dr. Sylvester's testimony.[26] This indicates to us that petitioner had not changed his mind about presenting psychological evidence to the jury and thus cannot claim that the State's strategy to counter his argument before he made it, rather than in rebuttal, violated his rights.

To us, petitioner's announced intention to present psychiatric testimony in has favor vitiated the Smith Court's concerns. There, the defendant was suddenly faced with the use of self-incriminating testimony on an issue he had

never raised. In contrast, petitioner in the present case chose to bring psychological evidence to the jury's attention and cannot now complain because the State attempted to counter his argument with evidence of its own. Just as a defendant cannot take the stand and lie, secure in the knowledge that his prior confession will be excluded solely because he had not received Miranda warnings, see Harris v. New York, 401 U.S. 222, 91 S.Ct. 643 (1971), we find nothing in the Constitution that prohibits the State from introducing psychological opinions based on statements a defendant has given in the absence of Miranda warnings when the defendant himself plans to make his mental abilities an issue.

IV.

We come to petitioner's final claim. Petitioner claims that Fla. Stat.

§921.141(5)(h), which defines a killing that is "especially heinous, atrocious, or cruel" as an aggravating circumstance, was applied by the trial court and the Supreme Court of Florida in an unconstitutionally vague and overbroad manner. Specifically, petitioner contends that every stage of the state court proceedings was infected by this vague and overboard application of section (5)(h), from the inadequate jury instruction, to the trial court's finding, to the supreme court's review of that finding. We disagree.[27]

At the beginning of the sentencing proceeding, the state trial court instructed the jury that an aggravating circumstance for its consideration was whether "the capital felony was especially heinous, atrocious, or cruel". The court continued: "heinous means extremely wicked or shockingly evil. Atrocious means

outrageously wicked and vile, and cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others". The jury returned a sentencing verdict of death. Because it submitted no written or oral findings, we have no way of knowing whether the jury found the aggravating circumstance under section (5)(h) applicable in this case.

The trial court, however, in its findings of fact, specifically found section (5)(h) applicable to the killing: "[T]he capital felony was especially heinous, atrocious or cruel, in that, after initially shooting the victim and while the victim lay helplessly bleeding on the floor, the defendant deliberately leaned over the counter and shot the victim in the head".

Recognizing that its review of trial court findings in death penalty cases "supplied the channeled discretion and deliberation necessary to avert the constitutional deficiencies condemned in Furman v. Georgia," Hargrave v. State, 366 So.2d 1, 4-5 (Fla. 1978) (per curiam) (citing Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976)), cert. denied, 444 U.S. 919, 100 S.Ct. 239 (1979), the Supreme Court of Florida began by restating the trial court's findings. The supreme court then added: "In more common terms, the [petitioner] in a calculated fashion 'executed' the victim to avoid later identification". Hargrave, 366 So.2d at 5.[28] The court also noted the testimony of two people "who stated that [petitioner] had told each of them that he had killed someone before, and it would not bother him to kill again". Hargrave, 366 So.2d at

5. The supreme court, affirming the trial court's finding, concluded that "[t]he sum of all this evidence justifies a finding that the appellant's act of firing the third shot into the head of the victim was 'extremely wicked or shockingly evil'." Id. (citations omitted).

In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726 (1972), the Supreme Court stuck [sic] down sentencing procedures that created a substantial risk that the death penalty would be inflicted in an arbitrary and capricious manner. A capital sentencing scheme must provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not". Gregg v. Georgia, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932 (1976) (quoting Furman, 408 U.S. at 313, 92 S.Ct. at 2764 (White, J., concurring)). Consequently, the

standards that a state enacts to channel the sentencer's discretion must be "clear and objective", Gregg, 428 U.S. at 198, 96 S.Ct. at 2936, (quoting Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974)), and "make rationally reviewable the process for imposing a sentence of death". Woodson v. North Carolina, 428 U.S. 280, 303, 96 S.Ct. 2978, 2991 (1976). Thus, the Court has held that a finding that a killing was "outrageously or wantonly vile, horrible or inhuman", used as a basis for implementing the death penalty, violated the eighth amendment because that standard, standing alone, in no way acted as a "restraint on the arbitrary and capricious infliction of the death sentence". Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1765 (1980).

Petitioner does not contend that section (5)(h) is unconstitutional on its

face. In Proffitt v. Florida, 428 U.S. 242, 255, 96 S.Ct. 2960, 2968 (1976) (plurality), the Supreme Court stated that section (5)(h) must be considered in light of the Supreme Court of Florida's construction of that section. Because Florida's high court had previously construed section (5)(h) as applying only to killings that were "'especially' heinous, atrocious or cruel" in that they involved a "conscienceless or pitiless crime which is unnecessarily tortuous to the victim", id. (quoting Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950 (1974)), the Court found that section (5)(h) sufficiently channeled a sentencer's application of that circumstance. What petitioner does contend, rather, is that, because neither the trial court nor the

Supreme Court of Florida employed a sufficiently narrow construction of section (5)(h), the section was applied to him in an unconstitutionally vague manner.

In Proffit v. Wainwright, 685 F.2d 1227, 1263 (11th Cir. 1982), cert. denied, 464 U.S. 1002, 104 S.Ct. 508 (1983), this court was faced with an identical claim: "whether the construction of the [section 5(h)] aggravating factor evinced by the trial court's application of it to the facts . . . comports with the eighth amendment requirement that death sentences be based on clear, detailed, and rationally reviewable standards". (Citation omitted). We began by noting, as the Supreme Court had, that Florida's high court accorded a limited interpretation to "heinous, atrocious, and cruel" by requiring that the "horror of the murder be accompanied by such additional acts as to

set the crime apart from the norm". Id. (quoting Dixon, 283 So.2d at 9). We further noted that one set of "additional acts" identified by the Supreme Court of Florida are those acts that make the murder "conscienceless or pitiless" because they are "unnecessarily torturous to the victim". Proffitt, 685 F.2d at 1263 (citations omitted). We concluded that the trial court had not employed a sufficiently narrow construction of section (5)(h). The trial court had concluded simply that the murder--resulting from a single knife stab to the victim's chest--was especially heinous, atrocious, or cruel; it did not state that the murder was torturous and did not identify the facts upon which it had relied. And because the Supreme Court of Florida's decision affirming the sentence did not indicate that it even considered the propriety of applying section (5)(h) to

the facts, we concluded that its "review 'in no way cured' the exercise of 'uncontrolled discretion' by the trial judge". Id. at 1265 (quoting Godfrey v. Georgia, 446 U.S. 420, 429, 100 S.Ct. 1759, 1765 (1980)). Finally, our independent examination of the facts in Proffitt led us to conclude that the murder was not "heinous, atrocious, or cruel" in light of the interpretation given that aggravating circumstance by the Supreme Court of Florida.[29]

A claim similar to the one presented here and in Proffit was presented to the Supreme Court in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980). There, the defendant was convicted of killing his wife and his mother-in-law by shooting each in the head with a shotgun. The sentencing jury found that the murder was "outrageously or wantonly vile, horrible or

inhuman in that it involved torture depravity of mind, or an aggravated battery to the victim". Id. at 422, 100 S.Ct. at 1762 (plurality). A plurality of the Court found that the application of this aggravating circumstance to the facts in Godfrey violated petitioner's eighth amendment right: not only had the Supreme Court of Georgia, when reviewing the case, not employed the limitations that it had previously held applicable to that aggravating circumstance--that the killing involve either aggravated battery or torture--but there was no way to distinguish that case from the many in which the death penalty was not imposed. Id. at 433, 100 S.Ct. at 1767.

In sum, the state reviewing courts in both Proffitt and Godfrey failed to give any explanation or set forth any facts upon which the courts justified their findings

of the particular aggravating circumstance under review. Moreover, upon an independent examination of the record, neither this circuit in Proffit nor the Supreme Court in Godfrey could distinguish the facts in the case before it from the many in which the state courts had not found the particular aggravating circumstance to apply. With this precedent in mind, we turn to the facts of the case before us.

In contrast to the courts in Proffitt and Godfrey, the trial court here identified the facts forming the basis of its finding that the murder was "especially heinous, atrocious, or cruel": the petitioner deliberately leaned over the counter and shot the store clerk while he lay bleeding, helplessly, on the floor. The Supreme Court of Florida upheld the trial court's finding, describing the

killing as an execution committed to avoid later identification and noted the petitioner's statement that it would not bother him to kill again, a statement presumably relevant to his future dangerousness and his feelings of remorse. Our task is to determine whether these factors sufficiently narrowed section (5)(h) so as to comport with the requirement that "death sentences be based on clear, detailed, and rationally reviewable standards". Proffitt, 685 F.2d at 1263 (citing Godfrey, 446 U.S. 427-33, 100 S.Ct. at 1764-67).

Just as the Supreme Court of Florida has held the presence of torturous acts to limit sufficiently the meaning of "heinous, atrocious, or cruel", see Proffit, 685 F.2d at 1263, it also has found that acts making a murder "execution-style" appropriately fall into that category.[30] An execution-

style murder, as defined by the Florida courts, is typically one in which the defendant, without provocation, first renders his victim helpless--for example, by wounding the victim, tying the victim's hands, or ordering the victim to the floor--and then shoots the victim in the head at close range, often to eliminate the victim as a future witness. Compare e.g., Ferguson v. State, 417 So.2d 639, 646 (Fla. 1982) ((5)(h) proper when defendant shot victims in head while they were lying on floor with their hands tied behind their backs); Jones v. State, 411 So.2d 165, 169 (Fla.) (per curiam) ((5)(h) proper when defendant shot victim in back of head at point-blank range as victim lay prone on floor pleading to be saved), cert. denied, 459 U.S. 891, 103 S.Ct. 189 (1982); Palmes v. State. 397 So.2d 648, 650, 657 (Fla.) (per curiam) ((5)(h) proper when victim

bound and gagged at time of killing), cert. denied, 454 U.S. 882, 102 S.Ct. 369 (1981); Ruffin v. State, 397 So.2d 277, 282 (Fla.) (per curiam) ((5)(h) proper where victim "shot in the back of the head while lying face down"), cert. denied, 454 U.S. 882, 102 S.Ct. 368 (1981); Clark v State, 379 So.2d 97, 100, 104 (Fla. 1979) (per curiam) ((5)(h) proper where victim's hands were tied behind his back with wire and defendant "marched the victim into the bushes, made him kneel down, and shot him twice in the back of the head), cert. denied, 450 U.S. 936, 102 S.Ct. 1402 (1981); Ford v. State, 374 So.2d 496, 502 n.1 (Fla. 1979) (per curiam) ((5)(h) proper because victim had been rendered helpless by the time the final, fatal shot was fired), cert. denied, 445 U.S. 972, 100 S.Ct. 1666 (1980); Sullivan v. State, 303 So.2d 632, 637-38 (Fla. 1974) ((5)(h)

proper when defendant struck victim twice in head with tire iron, then shot him in back of head with shotgun, reloaded and shot again), cert. denied, 428 U.S. 911, 96 S.Ct. 3226 (1976) with e.g., Middleton v. State, 426 So.2d 548, 552 (Fla. 1982) (per curiam) ((5)(h) improper where victim was killed instantaneously and had no awareness that he was about to be shot), cert. denied, 463 U.S. 1230, 103 S.Ct. 3573 (1983); Armstrong v. State, 399 So.2d 953, 962-63 (Fla. 1981) (per curiam) ((5)(h) improper when no evidence that victims were helpless when killed, death occurred relatively instantaneously, and proof was insufficient that motivation for murders was witness elimination); Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979) ((5)(h) improper because "[a]lthough the victim's arms may have been in a submissive position at the time he was shot . . .

there is nothing to set his execution murder 'apart from the norm of capital felonies.'").

In this case, the facts clearly establish an execution-style murder of the kind the Supreme Court of Florida has said can be properly termed "especially heinous, atrocious or cruel". When the victim Jones was unable to open the jammed cash register, petitioner fired two shots at him, one of which hit Jones in the chest. At that point, Jones, bleeding on the floor, had been rendered helpless. A significant amount of time then passed, during which petitioner walked behind the counter and unsuccessfully tried to open the register, successfully diverted the attention of a potential customer, and waited for that person to leave the store, get into a car, and drive away. Petitioner then walked to the front of the counter,

and because he was aggravated and afraid of getting caught,[31] he shot Jones in the head.[32] The way in which this murder was commmitted can thus be described fairly as an execution of a victim, rendered helpless by the petitioner, for the purpose of witness elimination. This is a characterization of a murder "accompanied by such additional acts as to set the crime apart from the norm". Cooper v. State, 336 So.2d 1133, 1141 (Fla. 1976) (per curiam) (citation omitted), cert. denied, 431 U.S. 925, 97 S.Ct. 2200 (1977). We thereby find that the construction of (5)(h) given by the trial court and the Supreme Court of Florida "comports with the eighth amendment requirement that death sentences be based on clear, detailed, and rationally reviewable standards". Proffitt, 685 F.2d at 1263 (citing Godfrey, 446 U.S. at 427-33, 100 S.Ct. 1764-67).[33]

The district court's denial of the writ of habeas corpus is

AFFIRMED.

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[1] These facts are derived in large part from petitioner's post-arrest confession to the police, which was read into the record at his trial.

[2] See Fla.R.Crim.P. 3.210 (1975).

[3] Apparently as a result of the experts' determinations, the petitioner chose not to raise an insanity defense.

[4] Karge was not tried with petitioner; he entered a guilty plea to second-degree murder and was sentenced to 20 years imprisonment. Karge did not testify at petitioner's trial.

[5] In Florida, if a defendant is found guilty of first-degree murder and the state seeks the death penalty, a second, sentencing proceeding is conducted during which the state and the defense present evidence that either militates in favor of imposing the death penalty (termed aggravating circumstances), or that militates against imposing that penalty (termed as mitigating circumstances). See Fla. Stat. §921.141(1), (2) & (3) (1975). Weighing the evidence presented in aggravation and mitigation, the jury arrives at a sentencing recommendation that is then reviewed by the trial court. Fla. Stat. §921.141(3) & (4) (1975).

The statutory aggravating circumstances in effect at the time of petitioner's trial, found in Fla. Stat. §921.141(5), (1975) were:

(5) AGGRAVATING CIRCUMSTANCES--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery . . .

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

The statutory mitigating circumstances in effect at the time of petitioner's trial, found in Fla. Stat. §921.141(6)

(1975) were:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

[6] Fla. Stat. §921.141(4) (1975) provided for automatic direct review of a judgment and conviction and sentence of death to the Supreme Court of Florida. On direct appeal, petitioner raised, among others, the third claim that he raises here; he contended that the trial court applied Fla. Stat. §921.141(5)(h), which defines a killing that is "especially heinous, atrocious, or cruel" as an aggravating

circumstance, in an overbroad and vague manner. Although he did not explicitly claim that this application violated the eighth amendment to the United States Constitution, his contention that "the commission of the homicide in this case in no way sets the crime apart from the norm of capital felonies" clearly posed that constitutional argument.

In a "supplemental brief" filed after oral argument but shortly before the Supreme Court of Florida issued its opinion, petitioner raised the second and third components of the first claim he presents here. See infra text accompanying note 9. In that document, petitioner claimed that his eighth amendment rights had been violated because "the trial court and counsel for the state and defense incorrectly assumed [at his sentencing hearing] that mitigating circumstances were limited to those in the statute. He asked that the case be remanded for a new sentencing hearing. The supreme court affirmed the trial court's conviction and sentence, but did not acknowledge or address that claim in its published opinion. See Hargrave v. State, 366 So.2d 1 (Fla. 1978) (per curiam), cert. denied, 444 U.S. 919, 100 S.Ct. 239 (1979). The supreme court later summarily denied motions by petitioner to withdraw its opinion and for rehearing that requested the court to reconsider its disposition of this claim.

Petitioner did not raise his second claim before us--that his fifth and sixth amendment rights were violated by the introduction of the testimony of the

state's psychiatrist--until his first collateral attack under Fla.R.Crim.P. 3.850 (1977). See infra note 7.

[7] Petitioner raised his second claim for the first time in this Rule 3.850 motion. See supra note 6. The trial court dismissed the claim on direct appeal and therefore did not consider its merits. The Supreme Court of Florida affirmed with an unpublished opinion that similarly declined to reach the merits. Hargrave v. State, 396 So.2d 1127 (Fla. 1981) (per curiam).

[8] In this motion, petitioner again raised the second claim he presents here, see supra notes 6 and 7, following the United States Supreme Court's decision in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866 (1981). This time the trial court reached the merits of petitioner's Estelle claim, but denied petitioner relief. The Supreme Court of Florida affirmed. In its opinion, the court held that Estelle was inapposite. See Hargrave v. State, 427 So.2d 713 (Fla. 1983).

[9] At the beginning of the trial's penalty phase, the court instructed the jury on aggravating circumstances. Then, after stating "the mitigating circumstances which you may consider", the court listed the seven mitigating circumstances of Fla. Stat. §921.141(6) (1975). See supra note 5.

[10] Rule 3.390(d) of the Florida Rules of Criminal Procedure (1975) provided that to preserve the issue for appellate review, a jury instruction must be objected to "before the jury retires to consider its

verdict".

11 Petitioner raised his jury instruction claim again in a motion to vacate sentence under Fla.R.Crim.P. 3.850 (1977), filed with the trial court. It found the motion "insufficient as a matter of law", because "it present[ed] grounds that were actually litigated on direct appeal or were otherwise inappropriate for a motion to vacate". The Supreme Court of Florida affirmed the trial court's denial of petitioner's motion to vacate sentence without reaching the merits of petitioner's jury instruction claim: "The trial court found, and we so hold, that the issues raised by appellant either were or could have been raised on direct appeal, or they involve changes in decisional law not cognizable in a 3.850 motion". Hargrave, 396 So.2d at 1127-28 (citations omitted).

12 It appears from the record that petitioner did not file a reply brief on direct appeal.

13 Petitioner later raised the arguments found in his supplemental brief in a motion to vacate sentence under Fla.R.Crim.P. 3.850 (1977) filed with the Florida trial court. Neither the trial court nor the Supreme Court of Florida addressed the merits of those claims. See supra note 11.

14 Petitioner, who was tried in 1975, cites a 1973 decision of the Supreme Court of Florida that said a finding of one aggravating circumstance renders a death sentence presumptively appropriate unless it is overridden "by one or more of the mitigating circumstances provided" in the

statute. State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950 (1974). Petitioner also cites Cooper v. State, 336 So.2d 1133 (Fla. 1976) (per curiam), cert. denied, 431 U.S. 925, 97 S.Ct. 2200 (1977), which was decided in 1976, after petitioner's trial and after petitioner's main brief was filed in his direct appeal. In Cooper is the statement that the Florida "Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty for 'the most aggravated and unmitigated of serious crimes', and we are not free to expand the list". Cooper, 336 So.2d at 1139 (footnote omitted).

15 This circuit has held that Lockett is to have retroactive effect. Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985) (per curiam) (en banc).

16 The statute prefaced the list of aggravating circumstances with the statement that they "shall be limited to the following: . . ." Fla. Stat. §921.141(5) (1975); see supra note 5. The list of mitigating circumstances is preceded by the statement that "[m]itigating circumstances shall be the following: . . ." Fla. Stat. §921.141(6) (1975); see supra note 5.

17 See supra note 14.

18 The Supreme Court of Florida issued its opinion on petitioner's direct appeal on June 30, 1978. It was not until more than two months later, on September 7, 1978, that the supreme court squarely addressed

the scope of admissible mitigating evidence, holding that its construction of the statute "has been that all relevant circumstances may be considered in mitigation, and that the factors listed in the statute merely indicate the principle factors to be considered". Songer v. State, 365 So.2d 696, 700 (Fla. 1978) (per curiam), cert. denied, 441 U.S. 956, 99 S.Ct. 2185 (1979).

19 Florida was the first state in the wake of Furman to redraft its death penalty statute, just two years before petitioner's trial.

20 The test enunciated by Sykes is two-pronged: a habeas petitioner must show both cause and prejudice for his procedural default in the state courts. Because the petitioner in this case did not show cause, we need not address the issue of prejudice.

21 See Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). Petitioner also asserts that his sixth and fourteenth amendment right to counsel was violated because the State failed to inform petitioner's counsel that statements made by petitioner to Dr. Sylvester might subsequently be used by the State. We find no merit to this claim, in light of our conclusion regarding petitioner's self-incrimination theory.

22 In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[23] The Smith Court explicitly stated that "no Fifth Amendment issue would have arisen" had the examining psychiatrist's testimony been used solely for a determination of the defendant's competency. Smith, 451 U.S. at 465, 101 S.Ct. at 1874. Thus, that decision clearly cannot be read as ordering the exclusion of a defendant's statement to a psychiatrist, given in the absence of Miranda warnings, on the ground that a psychiatric examination is inherently coercive or the statements a defendant makes during the course of it are inherently involuntary. Unlike the interrogation methods the Supreme Court barred in Miranda, the case before us lacks the coercive atmosphere and potentially unreliable confession that Miranda presented. This difference, and the Smith Court's emphasis on the use of the psychiatrist's testimony rather than on the examination itself, further supports our conclusion that the fairness concerns in Smith are lacking in the facts of the present case.

[24] The defense actually called Dr. Corwin, not Dr. Jarrett, to testify. Nothing in the trial transcript indicates that the reference to Dr. Jarrett was anything more than confusion among the trial participants regarding Dr. Corwin's name. Both the State and defense had exchanged witness lists before the trial began, lists that included the names of the experts who had examined petitioner. Petitioner does not claim that the State "sandbagged" him by not revealing its intention to call Dr. Sylvester to testify.

[25] Petitioner does not contend that the

State violated his rights merely by presenting its psychological witness before the defense did the same. Petitioner might have objected to the State's failure to adhere to the traditional order of proof, but we need not decide whether such an objection would be meritorious in the context of his Smith claim.

[26] Despite petitioner's failure to object to Dr. Sylvester's testimony, the Florida courts considered his claim on the merits in a collateral attack. See supra note 8. We are thus authorized to consider petitioner's consitutional claim. We note, however, that not only did petitioner's counsel not object to Dr. Sylvester's testimony, he also made extensive use of it when he urged the jury to show leniency in light of petitioner's mental problems. Petitioner's counsel relied much more on Dr. Sylvester's testimony than on that given by the psychologist who testified for the defense, making this case similar to Witt v. Wainwright, 714 F.2d 1069 (11th cir. 1983), rev'd on other grounds, 467 U.S. 1258, 105 S.Ct. 844 (1985), where "[t]estimony . . . clearly indicates that petitioner would have called the psychiatrist to testify during the sentencing phase of his trial had the state failed to do so." 714 F.2d at 1076-80.

[27] Because we do not find that section (5)(h) was applied in an unconstitutionally vague or overbroad manner we need not reach the question whether, even if it were unconstitutionally vague as applied here, the imposition of the death penalty was nevertheless constitutional given the existence of at least one remaining

aggravating circumstance and an adequately conducted proportionality review. See Zant v. Stephens, 462 U.S. 862, 890, 103 S.Ct. 2733, 2750 (1983).

28 A short colloquy from the petitioner's post-arrest statement to police is instructive on this point:

DETECTIVE MAJOR: "When you shot the clerk the third time, did you intend to kill him?"

THE DEFENDANT: "Yes, I did."

DETECTIVE MAJOR: "Why did you want to kill the clerk?"

THE DEFENDANT: "Because I was scared, and I was aggravated."

DETECTIVE MAJOR: "Why were you scared?"

THE DEFENDANT: "I was afraid I was going to get caught."

Hargrave, 366 So.2d at 5.

29 The only physical act perpetrated on the victim in Proffitt was a single knife stab to the chest. We cited several cases having similar facts in which the Supreme Court of Florida had reversed the finding of a section (5)(h) aggravating circumstance. See Proffitt, 685 F.2d at 1264.

30 Further, the Supreme Court of Florida has held in the past that a defendant's lack of remorse, although insufficient by

itself, can be taken into consideration in determining whether a killing was "especially heinous, atrocious, or cruel". Sireci v. State, 399 So.2d 964, 971 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2275 (1982). In 1983, however, the supreme court held that lack of remorse should no longer be considered as, or contributing to, an aggravating factor, because it is often difficult to ascertain. Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983).

31 See supra note 28.

32 Petitioner contends in his brief that this court should overturn any finding, implicit in the trial court's findings, that the victim was alive after the first shot to his chest. Although he advances this argument to combat any conclusion that the killing was torturous, we assume he would also advance it to combat a conclusion that the shot to the victim's head was an "execution". That Jones was alive after the first shot to his chest is implicit in the trial court's findings. This finding is one of fact and is presumed correct unless the petitioner can prove, by convincing evidence, that the factual determination of the court was erroneous. See 28 U.S.C. §2254(d) (1982). We find that a determination that the victim was still alive after the first shot is completely consistent with the evidence presented and, therefore, will not disturb the trial court's findings.

33 In Proffitt, 685 F.2d at 1262 n. 54, we found a jury instruction identical to the one given here, see supra note 9, to limit

sufficiently the jury's discretion. In this case, that error was rendered harmless by the trial court's findings, which explained why (5)(h) is applicable, and by the supreme court's review, which discussed the propriety of applying (5)(h) to the case.

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

STATE OF FLORIDA,

CASE NO. 75-118A

vs.

LENSON A. HARGRAVE,

DEFENDANT.

FINAL JUDGMENT

THIS CAUSE CAME on before the Court for trial by Jury, and after deliberations a verdict was rendered, finding the defendant guilty of Murder in the First Degree.

Thereafter, the defendant was adjudicated guilty by the Court, and the jury after hearing additional matters, retired to consider an advisory sentence pursuant to Florida Statute 921.141 (2). The majority returned and in open court recommended that this Court impose the death penalty upon the defendant.

This Court, independent of, but in agreement with, the advisory sentence

rendered by the jury does hereby impose the death penalty upon the defendant LENSON A. HARGROVE [sic], and in support thereof as required by Florida Statute 921.141 (3), submits this, its written findings upon which the sentencing of death is based.

The findings of the Court are as follows:

1. That the aggravating circumstances found by the Court to be present and listed by the Court with the lettering as set forth in Florida Statute 921.141 (5), are as follows:

(d) That the capital felony was committed while the defendant was engaged in the attempt to commit a robbery.

(e) That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

(f) That the capital felony was committed for pecuniary gain.

(h) That the capital felony was especially heinous, atrocious or cruel, in that, after initially shooting the victim and while the victim lay helplessly bleeding on the floor, the defendant deliberately leaned over the counter and shot the victim in the head.

2. That none of the remaining aggravating circumstances, set out by statute to be considered, were proved beyond a reasonable doubt.

3. That as to mitigating circumstances, the court finds as follows:

(a) That there is some evidence of prior criminal activity on the part of the defendant; however, there have been no prior convictions so that it must fairly be said that the defendant has no significant history of criminal activity.

(b) That the defendant was not under the influence of extreme mental or

emotional disturbance when the capital felony was committed.

(c) That the victim was not a participant in the defendant's conduct nor did he consent to his acts.

(d) That the defendant was not merely an accomplice in the capital felony committed by another person and that his participation was not relatively minor.

(e) That the defendant did not act under extreme duress or under the substantial domination of another person.

(f) That although there is some evidence of a personality defect in the defendant and some possibility of an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the Court finds that such capacity was not substantially impaired.

(g) That the age of the defendant at the time of the crime, that is, a few days less than 19 years, is a mitigating circumstance; however, he was, at the time of the crime, self-supporting as an adult being employed by a security company. The Court finds that the defendant is of average intelligence or possibly slightly less than average intelligence.

4. It may be, as alleged by the defense, that there could be some doubt as to whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired to some degree. There is no doubt that the defendant has a history of some mental abnormalities which may yet be affecting the defendant; however, it is the finding of the Court that such abnormalities only constitute a personality defect. A great

number, possibly a majority of all persons who commit crimes, also have this or a similar type of personality defect.

5. The Court is in agreement with the jury that the aggravating circumstances in this case outweigh the mitigating circumstances. Therefore, the Court has no choice under the law but to impose the death penalty upon the defendant, LENSON A. HARGRAVE.

WHEREFORE, IT IS,

ORDERED AND ADJUDGED as follows:

1. That you, LENSON A. HARGRAVE, be, and you are hereby sentenced to death.

2. That you are hereby remanded to the custody of the Dade County Department of Corrections to be conveyed to the State Division of Corrections for execution of this sentence according to law.

DONE AND ORDERED in open Court, at Miami, Dade County, Florida, this 18th day of July, A.D., 1975.

/S/ Gene Williams
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION
CASE NO.: 75-118A

STATE OF FLORIDA,

VS.

LENSON ALFRED HARGRAVE,

Defendant.

JURY TRIAL

The above-entitled case came on for trial before The Honorable Gene Williams, Judge, Circuit Court, Criminal Division, Metropolitan Dade County Justice Building, 1351 Northwest 12th Street, Miami, Dade County, Florida, on Tuesday, July 15, 1975, at 9:00 a.m.

THEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD:

THE COURT: Ladies and gentlemen of the jury, you have found the Defendant guilty of murder in the first degree, a capital felony. The punishment for this crime is either death or life imprisonment without the possibility of parole for twenty-five calendar years.

In other words, life imprisonment in a capital case means that the Defendant is not eligible for parole until he has served twenty-five calendar years.

The law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the Defendant. The final decision as to what punishment shall be imposed, however, rests solely with the Judge of this Court.

This means that I can sentence the Defendant to death or to life imprisonment without the possibility of parole for twenty-five years, whatever your advisory sentence might be.

Your advisory sentence requires a majority vote of seven of you. The identity of the seven remains unknown. The entire jury will be polled as you were polled following the verdicts you entered in this case, only as to whether a majority of you joined in the advisory sentence.

During the hearing, you will receive evidence and testimony concerning certain aggravating or mitigating circumstances.

Following the presentation of this testimony, the attorneys will be permitted to address arguments to you on the penalty aspects of this case, and then you will retire to consider rendering to this Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, whether sufficient mitigating circumstances exist or outweigh any aggravating

circumstances found to exist, and whether, based on these considerations, the Defendant should be sentenced to life imprisonment or death.

Your verdict should be based upon the evidence which you have heard while trying the guilt or innocence of the Defendant and the evidence which will be presented to you in these proceedings.

Now, as to aggravating circumstances, aggravating circumstances shall be limited to the following: A, the capital felony was committed by a person under sentence of imprisonment. B, the Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. C, the Defendant knowingly created a great risk of death to many persons. D, the capital felony was committed while the Defendant was engaged, or was an accomplice in the

commission of, or an attempt to commit, or flight after committing, or attempting to commit any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb. E, the capital felony was committed for the purpose of avoiding or preventing the lawful arrest or effecting an escape from custody. F, the capital felony was committed for pecuniary gain. G, the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. H, the capital felony was especially heinous, atrocious, or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile, and cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.

If you do not find that there existed any of the aggravating circumstances which have been described to you, it would be your duty to recommend a sentence of life imprisonment.

Should you find one or more of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist or outweigh the aggravating circumstances found to exist.

The mitigating circumstances which you may consider, if established by the evidence, are as follows: A, the Defendant has no significant history of prior criminal activity. B, the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance. C, the victim was a participant in the Defendant's conduct or consented to the act. D, the Defendant was

an accomplice in the capital felony committed by another person and his participation was relatively minor. E, the Defendant acted under extreme duress or under the substantial domination of another person. F, the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. G, the age of the Defendant at the time of the crime.

Aggravating circumstances, as I have outlined them to you, must be established beyond a reasonable doubt before they may be considered by you in arriving at your decision.

Proof of aggravating circumstances beyond a reasonable doubt is evidence by which the understanding, judgment and reason of the jury are well satisfied and convinced to the extent of having a full,

firm, and abiding conviction that the circumstance has been proved to the exclusion of and beyond any reasonable doubt.

Evidence tending to establish an aggravating circumstance which does not convince you beyond a reasonable doubt of the existence of such circumstance at the time of the offense should be disregarded.

If one or more aggravating circumstances are established, you should consider all of the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.

I am going to permit you to take a copy of this instruction which I have delivered to you when you retire at the conclusion of this sentencing proceeding in order to deliberate.

I will also permit you to take a copy of the charge that I give you at that time with you, in order to assist you in your deliberations.

The State will call whatever witness --

MR. GOLDSTEIN: First of all, Your Honor, the State would move into evidence for the purpose of this proceeding, all evidence previously elicited by the State.

Well, I mean for the purpose of the record at this point. The jury knows what evidence it is. I'm talking about all previous testimony and physical evidence that was previously introduced by the State I will move into this hearing.

THE COURT: I don't know if it's necessary. It's already in evidence. If there is any doubt about it, I will grant it.

MR. GOLDSTEIN: At this time, the State would call Dr. Robert Sylvester.

Your Honor, I would ask that the rule be invoked. I see that there is another doctor here. Dr. Jarrett is also here. I would ask that Dr. Jarrett remain outside and any other witnesses that might be called by either the State or the Defense.

MR. WILLIAMS: I have a request to make in the nature of an exception to the invocation of the rule, Your Honor.

The Defendant's mother is going to testify as to certain mitigating circumstances, but I would request that notwithstanding that fact, she be permitted to remain. It's true for two reasons.

One, because obviously she has a vital interest in the proceedings, and second of all, because the Defendant's father has a certain hearing impairment and with the exclusion of the Defendant's mother from the Court, the Defendant's family has virtually no way of knowing what's happening in these proceedings.

MR. GOLDSTEIN: Your Honor, under the circumstances, I'll have no objection.

THE COURT: All right.

Is anyone going to call Dr. Jarrett as a witness?

MR. GOLDSTEIN: The State does not intend to.

MR. WILLIAMS: Then the Defendant will.

THE COURT: All right.

All possible witnesses are under the witness rule, except the mother of the Defendant, and will have to remain outside the Courtroom.

THE CLERK: Would you raise your right hand, please:

ROBERT W. SYLVESTER, Ph.D.

was called as a witness on behalf of the State, and after having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. GOLDSTEIN:

Q Doctor, would you state your name, please?

A Robert A. Sylvester.

Q And your occupation?

A I'm a clinical psychologist.

Q Doctor, what specific training have you had in the area of clinical psychology?

A I took my doctorate --

MR. WILLIAMS: Your Honor, I will stipulate to Dr. Sylvester's expertise as a clinical psychologist for the purpose of these proceedings.

MR. GOLDSTEIN: Thank you, Mr. Williams.

BY MR. GOLDSTEIN:

Q Doctor, did you have occasion to render an examination to Lenson Hargrave?

A Yes, I did.

Q Do you see him in the Court today?

A Yes, I do.

Q Would you point to him, please?

A Right there (indicating).

Q Indicating, for the record, Lenson Hargrave, the Defendant.

When and where did this examination take place?

A I examined him in the Dade County Jail, February 12, this year.

Q And how long an examination did you perform?

A About two and a half hours.

Q What examination did you perform?

A I gave him a number of intelligence tests, a number of so-called projective tests, such as a Bender-Gestalt, the Rorschach, the Personality Screening Inventory.

Q Doctor, would you first acquaint the jury and the Court what specifically a clinical psychologist is, the function of a clinical psychologist?

A Well, his primary function is as a psyco-diagnostician, to administer certain appropriate tests in order to determine the individual's intelligence, any personal or emotional disturbance, and then to conduct an examination to verify his test findings.

Q You mentioned certain examinations that you rendered to Lenson Hargrave. Would you tell the Court and the jury, going one by one, which tests you administered, first?

A Yes. I gave him three tests of intelligence, and they're known as the Amond's Quick Test.

Q Would you first explain what this test is, how it is administered?

A It is a verbal test, comprising a hundred items each, and takes about twenty minutes per test. They are largely verbally loaded. This is to say, they require the definition of a term and the identification of the term in an array of

pictures.

So, to that extent, it is non-verbal.

Q Could you give an example to the jury?

A Yes. We would show four pictures, and let's say one picture has that of a policeman and then you would ask questions around the role of the police officer, what his functions are. There might be as many as five or ten terms having to do with the function of an officer.

Another picture would show an automobile race, and he would have to identify certain terms that would illustrate his knowledge and familiarity with these terms.

Now, these begin at a very low level, perhaps at the fifth-grade level, and they proceed in increasing difficulty to the college level.

Q All right.

You then did render this test to Lenson Hargrave?

A That's right.

Q What were the results of this test?

A He scored at a level of dull-normal to normal. In terms of an IQ, if that is more familiar to you, it would range between 87 and 92, with a mental age of sixteen to seventeen.

When I saw him, the Defendant was nineteen. So, you see, these scores are close to normal.

Q What was the next test that you administered to the Defendant?

A I then gave him the Bender-Gestalt. This is a highly sophisticated measure in which the individual is required to reproduce a number of designs, and it is in the reproduction of those designs which

indicate primarily brain damage or organicity.

On this particular test measure, the Defendant made a score of 90, and a cut-off score of 70 is indicative of psychiatric intervention. I might say that a score of 80 suggests that on a problematical basis, not one person in a thousand would be normal in his entirety.

So, what we're dealing --

Q I'm sorry. Not to interrupt you. Would you explain what you mean not one person in a thousand would be normal in a score of 80?

A On that score. 50 would be the score more likely derived by a so-called normal individual. Any score above 70 to 80 is highly suspect that there is some kind of brain damage or some malfunctioning in the thinking process of the individual. This man scored 90.

Q And did you then give any other tests?

A Yes. I had to, of course, if I could, confirm the presence of whatever I could and I gave him a Rorschach, and I gave him the PSI, the Personality Screening Inventory.

On this particular score, he made a score of 75, where a score of 50 to 60 is so-called normal level.

Now, in terms -- should I define what I found, rather than numbers?

Q Yes, please.

A Well as I said, on the first measure that I described, there appears to be some degree of impairment. Now, whether the impairment is due to what we would call geno or hereditary, that's one case, chemogenic, the result of drug ingestion, histo, or history of the individual that is of injury, that remained to be discovered through further examination.

There is a record of drug ingestion of some years, essentially marijuana, but there was some ingestion of heroin, Quaalude, and some of the other disabling amphetamines.

On the PSI, I found a good deal of what we might call alienation of rebellion against authority figures. If I had to classify the Defendant, it would be in a category or sociopath, someone who has a great deal of difficulty conforming to and adjusting to the mores or demands of society.

Do you want me to continue, Mr. Goldstein?

Q Yes, Doctor.

Were there any other tests you administered?

A Yes. On the Rorschach, I found a good deal.

Q Would you explain the Rorschach?

A The Rorschach is a series of ten inkblots. They call it an unstructured test, because there are no specific questions, and there are no right or wrong answers.

The individual has to respond as he sees the stimulus of the blot. I found a good deal of morbidity in the test, a good deal of occupation with the dark, threatening, ego-threatening.

Q You said you found a good deal of --

A Morbid preoccupation with material which suggested a good deal of insecurity, apprehension, fear, and of course, the consequent rebellion against this is striking back of not knowing just what was wrong with him.

A good deal of a tendency to circumvent society's mores and what we expect of a responsible, achieving, well-

oriented individual. A lot of insecurity. A lot of nightmare material, if you like, that would reappear in the subconscious mind, reflecting a good deal of fear and anxiety.

There are some personality problems here of a major dimension, too.

Q What are the personality problems that you determined, Doctor?

Q To give you some specifics, for example, a good deal of adolescent rebellious behavior, disruptive behavior, hostility, and aggressiveness. Some deviant thoughts that would not conform to what one might expect of a normal, achieving, responsible, well-oriented individual, an adult.

Feelings of isolation, loneliness, alienation, apart, almost feelings of rejections. A good deal of emotional and unstable impulsivity, poor control, a lack

of inhibition, a liking for danger and aggressive excitement.

All of these, of course, are ways of saying a rather weak and shattered ego, you see. I found a great, almost overwhelming need to satisfy his inner needs which were ill-formed, non-specific, no plan, nothing for the future. It was a moment-to-moment kind of reaction, a lot of anxiety.

I found no psychosis, however.

Q Would you define psychosis for the jury?

A Yes. Any mental illness of a major nature that renders the individual incapable of satisfactorily performing and meeting the demands of society. We don't use the term insanity anymore, but that's what we're saying here by psychosis.

I found no active psychosis.

Q What you're saying is, Lenson Hargrave, to use the word insane -- I realize you say we don't use that word anymore, but to put it back in layman's terms, Lenson Hargrave would be sane?

A That's right.

MR. WILLIAMS: I'm sorry, Your Honor. I understand these proceedings are slightly different, but I have to object to that, because the Defendant's sanity has never been made an issue in these proceedings, and the Defendant's sanity, as such, is not material for the purpose of determining the existence of any aggravating or mitigating circumstances in this penalty phase.

If the Defendant has sought to suggest to the jury he were legally insane, that would have been done in the guilt phase, and since it hasn't been done, the question of insanity, as such, is immaterial.

MR. GOLDSTEIN: Your Honor, I feel it's part of Dr. Sylvester's overall evaluation of the Defendant.

MR. WILLIAMS: It may be, but at law, persons are presumed sane, unless there's been proof to the contrary, and we did not raise the question of legal sanity during the guilt stage, which was when, if at all, it should have been properly raised, and that was done because we know what Dr. Sylvester's conclusions with regard to this Defendant are, but it has no bearing upon this jury finding any aggravating or mitigating circumstances.

THE COURT: All right.

We'll go with that, then. In other words, the Defendant is not claiming insanity under any circumstances.

BY MR. GOLDSTEIN:

Q Doctor, in your dealing with the Defendant, were you able to determine at all his relationship with one Larry Karge?

A Yes.

Q What would that relationship be, according to your determination?

A Well, his accomplice, according to the Defendant, provided transportation. He drove the vehicle.

Q Well, let me then rephrase my question.

Not with regard to specific facts or acts at the time, but I mean general personality relationship between the two or emotional relationship between the two?

A I got only this: That according to the Defendant, his friend had talked him into this robbery, called him chicken and other degrading terms until the Defendant finally agreed to the robbery, and his accomplice drove the car and so on.

So, it was a question here, according to the Defendant, of living up to a reputation, a matter of pride in the performance of the robbery.

In fact, his familiarity with weapons as a guard, more or less dictated his role, as opposed to his accomplice who merely drove the vehicle.

Q Were you able to determine who, between Larry Karge and Lenson Hargrave -- and not restricting your answer to that night. Were you able to determine who would play a dominant role in these two parties, in the interaction with each other?

A Not until I had been appointed to examine Mr. Karge.

Q Well, based upon your examination of both, then, can you render an opinion at this time?

A Yes. After my very intensive examination of Karge, it appeared to me that the Defendant certainly played the dominant role. It was he who dictated the plan of action.

I found the other individual a weak, submissive person.

Q You're speaking of Larry Karge?

A Yes.

Q Doctor, can you render an opinion as to the value of rehabilitation to Lenson Hargrave?

MR. WILLIAMS: I object to that, Your Honor.

THE COURT: Sustained.

BY MR. GOLDSTEIN:

Q Do you see any need, at the present, for any psychiatric treatment for the Defendant?

MR. WILLIAMS: Objection.

THE COURT: Sustained.

MR. GOLDSTEIN: I thank you, Doctor.

No further questions.

CROSS EXAMINATION

BY MR. WILLIAMS:

Q Dr. Sylvester, when you conducted that portion of your evaluation of Lenson Hargrave, that was based more on your subjective diagnostic impression on the basis of your experience, rather than the result of the tests that you administered, did you get any impression that Mr. Hargrave was malingering in any way, trying to fake or falsify any results or convey to you any inappropriate impression?

A No, I got no reactions of that nature at all. I felt he was honest and forthright.

Q Did you get the same impression about Mr. Karge?

A Yes, I did.

Q You used words to describe Mr. Hargrave's personality problems such as disruptive behavior, deviant behavior, hostility, isolation, loneliness, things like that.

Would it be a fair statement to make, Dr. Sylvester, on the basis of your experience as a clinical psychologist -- and by the way, on how many occasions have you, either by Court appointment or through other mediums, conducted forensic evaluations of persons?

A Hundreds and hundreds of times.

Q Over what period of time, Dr. Sylvester?

A Twenty-five years.

Q On the basis of your experience in that regard, Dr. Sylvester, would it be fair to classify or describe the Defendant, Hargrave, in layman's terms, as being a person with substantial character defect?

A That would -- yes. That would be something like the personality sociopathic-type behavior that I described.

Q And you found in him, evidence that would tend to suggest the probable or likely presence of brain damage?

A Yes. I'm concerned about that Bender-Gestalt score.

Q And you found in him a behavior pattern that tended to indicate, really, an inability to function properly on a day-to-day basis in society, as we know it? Isn't that the case?

A Or appropriately. That's true.

Q So that it would be a fair statement to make that in your considered professional opinion, Mr. Hargrave's behavior at the time you evaluated him, was motivated by his responding to abnormal factors, factors that normally wouldn't impinge upon or affect the behavior of well-adjusted or emotionally healthy people?

A I don't think I understand your point here, Mr. Williams.

Q Would it be fair to state, sir, that in his day-to-day behavior, Mr.

Hargrave was acting in terms of or responding to abnormal factors, factors that would not generally, within the limits of psychological certainty, govern the day-to-day and minute-to-minute behavior of normal human beings?

A If you mean his responses to me.

Q I'm talking more, Dr. Sylvester, about his responses to circumstances and facts with which he came into contact in the course of his day-to-day life.

A I would gather, from my impression of him, that he would respond to those situations inappropriately at times; appropriately at other times.

Q You said that you found that Mr. Hargrave was, because of the conditions that you've determined exist, susceptible to goading, challenging, in order to get him to do things to inflate or enhance his self-image?

A Yes. I would agree to that.

Q And would it also be a fair statement to make, that he was particularly susceptible to doing things which would, in his judgment, no matter how distorted, cause him to think that other people, particularly peers of his, would regard him more importantly?

A Yes. I think he was trying to enhance his image.

Q In your evaluations and examinations of Mr. Karge, did you arrive at any conclusion with regard to Karge's sexuality?

A I would be reluctant to comment much further, because I don't have Mr. Karge's report, and that's been some time since I've read it.

The only thing that I could comment to, as I did today, is that I found him to be a very weak and permissive

individual. Beyond that, I wouldn't want to comment.

Q Given a situation, Dr. Sylvester, in which the person known to you as Karge had previously been working at the U-Tote-M store where the Defendant's charged, by this indictment, occurred, and described the interior to Hargrave, had planned what was to be a robbery, had instructed Hargrave how to act, insofar as rendering the store clerk neutral was concerned, and then, insofar as obtaining monies and paying attention to alarm systems were concerned, would you, under those circumstances, still have the same basic opinion concerning the relationship between Larry Karge and Lenson Hargrave as you do now?

Given as true the things that I've described.

A Given those facts to be the case?

Q As being true.

A Yeah. Well, I think it is one thing, Mr. Williams, to plan and to think about an operation of this nature. Quite a different one to put it into operation. In my judgment then, as I reflect back on my knowledge of this man, Karge, I don't think he had whatever it takes to do this kind of thing.

That's what I'm getting at.

Q But he had whatever it takes to plan it and to induce or procure somebody else to do it?

A He had the intelligence to do that.

Q All right.

Would you say that Karge's intelligence was measurably or demonstrably greater than Hargrave's?

A Here again, I'm going to have to not reply, because I don't remember the details of my report.

Q Dr. Sylvester, given the people whom you know as Karge of the one part and Hargrave of the other, are the behavioral and psychological symptoms or inducia that you found existed in Lenson Hargrave consistent with his reacting to the procurings or implorings of a Karge for the purpose of self-enhancement and the other things that you just discussed, to the extent that he could do and act such as that charged in this indictment?

A As you say, if these are the facts, certainly he would be responsive to that kind of challenge.

Q You said that you tested Hargrave for intelligence and found him to have a mental age of seventeen. Would you explain that finding to the jury, please?

A Yes. These tests are designed to reflect the individual's relative academic capacity, and the terms and materials used

in the test are standardized at the age levels, and I found that the Defendant was able to perform as expected at a mental age of sixteen to seventeen.

Q And, Dr. Sylvester, there isn't a measure or test or scale generally utilized by which a person's emotional age, as opposed to mental age is engaged, is there?

A No. I no [sic] of no measure.

Q But are you able to say, on the basis of your experience and expertise, and on the basis of the other test devices that you employed on Mr. Hargrave, within the limits of psychological certainty, of course, the emotional age level at which you could, within those limits, describe Mr. Hargrave as functioning?

A I could probably sum it up with one word. Immature, rather than attempt to derive a mental -- a year. I couldn't do that. I would certainly describe it as immature.

Q When you use that term immaturity, it takes on a different aspect when it's used collectively and conversationally on the one part as opposed to clinically?

A In the clinical sense, I mean inappropriate behavior. Behavior not expected of a normal, functioning, achieving adult at that age level.

Q And that clinical behavior would be directly attributable, would it not, sir, to various conditions that you described, including his relatively low IQ and the unstructured performance on the Rorschach and the results that he showed to you on the Bender-Gestalt, indicating the substantial likelihood of brain damage?

A The only change I would make in your statement, it's not a relatively low IQ. Dull-normal to normal.

Q Dull-normal?

A In the upper level is normal, 92.

Q Making that change, would you say that my last statement to you would be correct?

A I think it's substantially correct, yes.

Q You told the jury that the findings which you abstracted from your evaluation of Mr. Hargrave were consistent with a person who was striking back by virtue of his not knowing what was wrong with him.

Do you recall telling that to the jury?

A (Nodding affirmatively.)

Q I believe those were the words you used. I wrote them down when you said them.

A Well, he's a rebellious young man, and he was trying to assert himself. Weak ego, but certainly he was trying to defend it and project a strong image.

After all, he had been in a variety of non-demanding-type activities, chicken farming. Now, he's suddenly a guard, a position of great responsibility and some hazardous nature to it.

Q Putting aside for a moment the legal definition of sanity, because we're not concerned with that, and you are, of course, intimately familiar with that concept.

Putting aside that concept for a moment, Dr. Sylvester, would it be a fair statement to make that all of these findings at which you've arrived concerning the Defendant, Hargrave, endered him less than optimally or normally able to deal with what was going on around him in his day-to-day life?

A Less than optimally, I believe, to deal appropriately. I would have to agree with that.

Q Would you say his ability to deal appropriately with what was going on around him was impaired?

A Impaired?

Q Yes.

A To the extent he was emotionally involved in everything that happened to him and that, of course, rendered his judgment less objective.

Q Then, would it be a fair statement that his capacity for dealing in a normal fashion with things happening to him on a day-to-day basis was impaired to that extent?

A To some degree.

MR. WILLIAMS: Thank you, sir.

Nothing further.

REDIRECT EXAMINATION

BY MR. GOLDSTEIN:

Q Doctor, did you make an evaluation of Lenson Hargrave's regard for the law or for social conventions?

MR. WILLIAMS: I'm sorry, Your Honor. I don't think that's appropriate redirect examination. I did not explore that area on cross examination, and again, I don't think it's material at this juncture.

THE COURT: Will the reporter read me the question back?

(Whereupon, the preceding question was read back.)

THE COURT: You may answer yes or no.

BY MR. GOLDSTEIN:

Q Did you or did you not?

A Yes, I did.

Q And, Doctor, what was your evaluation?

MR. WILLIAMS: Object, Your Honor.

THE COURT: Don't answer that.

MR. GOLDSTEIN: Your Honor, I believe the answer to the question will be most relevant.

MR. WILLIAMS: Well, Your Honor, we would submit that in the indictment upon which the Defendant was charged, he was charged with the commission of a crime that regards the formulation of a specific intent.

That intent and the regard therefore about which Mr. Goldstein is now talking about would now be a matter concerning itself with the guilt or innocence of the Defendant. We think it inappropriate and immaterial at these proceedings.

MR. GOLDSTEIN: Judge, it's a matter bearing on the Defendant's character.

MR. WILLIAMS: But the Defendant's character, as such, is not in issue, Your Honor.

MR. GOLDSTEIN: I believe it is very substantially in issue.

Your Honor, it's his personality that we've been discussing since the beginning of calling Dr. Sylvester to the stand.

THE COURT: It could be relevant to one of the possible mitigating circumstances, number F.

Overruled.

MR. WILLIAMS: Your Honor, that lies with us.

THE COURT: Well, that may be, but I'm not sure it does. I'm not sure that that's the situation. It lies with the jury, really.

Overrule the objection.

BY MR. GOLDSTEIN:

Q Doctor, what evaluation did you make with reference to Lenson Hargrave's regard for the law and other social conventions?

A Well, I found a species, that is a superficial awareness of right and wrong with what one should and shouldn't do, but in consonance with this sociopathic personality that I have described, there was no question but what I found a disregard for social conventions, and even the law and the liking for danger and so on.

It depended upon the situation so much.

MR. GOLDSTEIN: Thank you, Doctor.

RECROSS EXAMINATION

BY MR. WILLIAMS:

Q Did I understand you correctly, Dr. Sylvester, to be telling the jury, sir, that because of these other conditions that you observed to be present in the Defendant, you believe him not to have had the same regard for the law and for conforming one's conduct to the law that a normal person would have?

A In substance, that's true.

Q And that thought pattern, if we can call it that, or state of mind, if you will, is, in your opinion, directly attributable to these abnormal factors that you found to exist?

A Yes. Yes. I think it was these abnormal factors which were contributors to his behavior.

Q You are not then saying, are you, Dr. Sylvester, that this is a situation in which we are dealing with a person of that degree of intelligence, coupled with judgment to a real situation of the requirements of society and living in this community, to be able, cooly and methodically, to arrive at a decision to disregard them for one's personal aggrandizement or gain, are you?

A I like the last half of what you said, intelligence having nothing to do,

necessarily, with it. As we know, brilliant men can be criminally oriented, but certainly the last half, I would agree with.

Q Then, your conclusion that Mr. Hargrave does not have what would be a normal regard for the law and does not conform his behavior to the law and society within normal or conventional limits, would be another manifestation of these conditions and problems that you found to exist?

A He has a normal regard to a point. You might call it an awareness of the need for law and order. After all, he preserves it. That was his job, but it was under the provocation and under the emotionally disturbing situations that he found himself that he could not exercise the kind of objectivity to which you have just referred.

I would agree with that.

MR. WILLIAMS: Thank you, sir.

Nothing further.

MR. GOLDSTEIN: Nothing further.

THE COURT: All right.

Doctor, thank you.

MR. WILLIAMS: Your Honor, I would like the jury excused for a moment before Detective Major resumes the stand.

THE COURT: The jury will retire to the jury room, please.

(Whereupon the jury retired from the courtroom, and the following proceedings were had.)

MR. WILLIAMS: We ask for a proffer from the prosecutor, if we can, Your Honor, because we doubt seriously that Detective Major has anything further to add.

THE COURT: All right.

What's the -- what does the State expect to produce from this witness?

MR. GOLDSTEIN: Judge, during the course of the witness' investigation, and some time subsequent to the confession which the Defendant gave to him, this witness was contacted by the Defendant, specifically contacted.

It was not in reference to further questioning. The witness has told us that he wanted to see -- the Defendant wanted to see the witness, and some time after that, the Defendant confessed to certain other robberies.

Two, as a matter of fact, the convenience-type stores, and that would be the sole purpose of this witness, and I submit to the Court that is relevant with regard to number one or A, rather on the mitigating circumstances, in that it's termed here. "A Defendant has no significant history of prior criminal activities."

I submit it is not just the function of the Defense in a proceeding of this nature to produce mitigating circumstances; therefore, leaving it up to the State to produce whatever aggravating circumstances we feel we must.

But it is the function of both sides to either show the presence or lack of presence of any of the circumstances, and it is the intent of the State, at this point, to show the lack of the presence of the first mitigating circumstance.

MR. WILLIAMS: Is there any question in the Court's mind that if the government saw to elicit that kind of testimony to prove the Defendant's guilt or innocence of robbery or of any crime, that it would be inadmissible unless there had been prior convictions?

MR. GOLDSTEIN: Judge, I don't believe that is the test.

THE COURT: When the purpose of it is to test the credibility of the Defendant or any other witness, then it would be imperative that the State prove convictions, but that is not what the mitigating circumstance says in the statute. It doesn't say anything about --

MR. WILLIAMS: But, Your Honor -- I'm sorry. I don't mean to interrupt the Court. What amounts to a history of prior criminal activity?

History is a past fact that is susceptible of proof. If the Court wants to instruct the jury that it can consider Detective Major's testimony not for the truth of what it is that he's relating, but only for the fact the words were uttered by the Defendant, Hargrave, then the Court might come closer to curing any error that would otherwise, in our humble judgment, would be inherent in permitting the witness to testify.

When we read the statute about prior criminal activity, we read that statute to mean that the same legal safeguards and legal facts have to be proven to show prior criminal history in this kind of a proceeding as they would under any other circumstance.

The Defendant wasn't even arrested for other robberies, for the robberies that Detective Major is talking about.

So, there is no history that he was even accused of those other crimes, much less convicted.

If the State is allowed to have Detective Major testify, the jury cannot help but automatically assume that Hargrave has committed other robberies to the same extent as if there were full proof put before them in the course of a guilt trial, but that's not history, Judge. That is not history, particularly in light of what Your

Honor has now heard Dr. Sylvester say about the things that motivate this boy and make him talk.

I think if Your Honor lets that kind of testimony come to this jury, it will be not only legally improper but grossly unfair.

MR. GOLDSTEIN: Judge, I think that Mr. William's definition of history is not applicable under these circumstances. The statute just sets out very clearly that the Defendant has no significant history of prior criminal activity.

I submit the fact that the Defendant, by his own admission, has committed two robberies is a significant history of criminal activities which should be brought to the attention of the jury.

Insofar as disallowing the Defense from arguing the presence of the first mitigating circumstance, it obviously

should not be present, because it doesn't exist, because there is a significant history of prior criminal activity.

MR. WILLIAMS: Let me give the court a quick hypothet. I don't mean to belabor the Court's time, but let's say, for the sake of argument -- the Court can assume the prosecutor knows, and I'm telling the Court now, that Lenson Hargrave is not going to testify to this jury on penalty any more than he did on guilt or innocence.

All right.

And that's something that could pretty well be anticipated by Mr. Goldstein and by the Court. Let's assume we didn't have a witness on the stand now of the caliber or the integrity of Detective Major or we didn't have a prosecutor here of the integrity of Mr. Goldstein, and let's say they knew that the Defendant wasn't going to take the stand and testify, unless say,

instead of Lenson Hargrave, he were just, by way of example, a Richard Cravero or somebody like that, and the prosecutor and the lead investigator really wanted to burn him and stick it to him.

What would prevent the State from calling to the stand a witness who could say, "Yes. The Defendant admitted to me to the commission of X other crimes, and we don't have to prove to you that they were done. We don't have to offer the kind of proof that we would to convict him of them at the trial," and that's what we're doing, convicting him of those crimes to all intent, and there would never be a check on it. We could never rebut that.

We could never say, "Where are his arrest records? Where are the records of conviction?"

Now, I am not, obviously, by any means, suggesting that that would be the

case here. I have already vouched personally for the integrity of Detective Major and Mr. Goldstein, but just by way of example, it is that kind of legal possibility that renders the testimony that the prosecutor now seeks to introduce improper.

THE COURT: Well --

MR. GOLDSTEIN: Judge, the only problem with disallowing the evidence is when it comes time for argument to the jury and Mr. Williams approaches the first mitigating circumstance and attempts to argue each point, there is going to be no evidence before the jury of any prior criminal activity, and therefore, he is perfectly within his right, and duty-bound to argue to the jury that the Defendant had no prior criminal activity, which I certainly believe to be untrue, and I feel the jury is entitled to full and fair disclosure of

all of the facts that are within our knowledge.

MR. WILLIAMS: It might be a gruesomely inappropriate word for me to use in this kind of proceeding, but the prosecutor is talking about overkill.

MR. GOLDSTEIN: I would take issue with the characterization of Mr. Williams at this point, Judge. It's not overkill. We're just looking at each criteria that's set out by the statute, and certainly ancitipating [sic] Mr. Williams' argument.

I feel it is just not proper to have him arguing that the Defendant has no significant history when, in fact, he does.

THE COURT: Well, that's true.

MR. GOLDSTEIN: Your Honor, I think by way of cross examination, certainly Mr. Williams can attack the statements, because there is no proof, per se, before the Court, other than the fact that Detective

Major is going to be testifying that Lenson Hargrave told him this.

MR. WILLIAMS: And it's exactly for that reason, Your Honor, that we suggest that to allow it to go to the jury in the first place in this kind of a proceeding, is improper. We are not now talking about evidence that is susceptible to the same kind of testing by cross examination or other legal procedures to which a person who is now defending his life has a constitutional right to utilize.

THE COURT: Well, he --

MR. WILLIAMS: There is one other thing that we would call to the Court's attention. We question, on constitutional grounds, the legality of so much of that portion of the statute as talks about the significant prior criminal activity or history.

We think that that word is defective under the Fifth and Fourteenth Amendment of the Constitution of the United States, by virtue of its being so vague, so broad and so completely incapable of precise definition or determination that it renders a person in Mr. Hargrave's position unable to know from case to case against what to be prepared to defend.

I have no quarrel with Your Honor's discretion, as such, but there are other Judges on this and other benches whose discretion does not match that of this Court's and for a statute to confer upon a Judge on a case-to-case basis, without any standards or guidelines, discretion to introduce or admit or reject the kind of evidence the government wants to produce now, we suggest is constitutionally impermissible.

THE COURT: Well, I don't know. Doesn't seem fair to the State or fair to the jury, which is more important, to keep from them information like that, but on the other hand, the Court is concerned, in view of the present state of the rulings coming out of the United States Supreme Court concerning prior convictions and how they can be used against a Defendant in other ways. I'm concerned about it to such an extent that I'm going to sustain the objection.

Is there anything else the State is going to bring forth from this witness?

MR. GOLDSTEIN: No, Your Honor. I have nothing else to elicit from this witness.

THE COURT: All right.

The witness can step down and the jury can be brought out here.

MR. GOLDSTEIN: Judge, before we do bring the jury out, there were two other

witnesses that I had sent for, and it was my understanding that they should be here very shortly, because a police car had been sent to pick them up at their places of work, because they did not have transportation.

THE COURT: That was an hour and ten minutes ago.

MR. GOLDSTEIN: That's right. That's why I believe they should be here shortly. I'm just waiting for word now to get an estimate of how long. I would like maybe to ask the Court for about a ten-minute recess, if it becomes necessary.

THE COURT: What's the latest word?

MR. GOLDSTEIN: That's what I'm waiting for right now.

THE COURT: Well, while we're waiting, I wonder if there is any possibility, inasmuch as -- I don't know whether this kind of proceeding should be on the same

basis as trial, but perhaps we could -- perhaps the Defense would put on the other doctor while he's standing around out here and we're not doing anything.

MR. WILLIAMS: All right.

Your Honor, we can do that. We would like to wait and call Mrs. Hargrave last.

MR. GOLDSTEIN: I'm sure by the time the doctor finishes testifying, assuming it will be somewhat lengthy, my witness will be here.

MR. WILLIAMS: While the jury's still out, Your Honor, is there any question as to whether, in the event that we present evidence in mitigation, that the State has closing argument to the jury?

THE COURT: I don't know.

MR. WILLIAMS: As we understand the statute, Your Honor, both sides have argument, obviously.

THE COURT: Under the circumstances, I would say that it's probably discretionary with the Court as to how the argument is conducted.

MR. WILLIAMS: Regardless of whether the State presents testimony or not? I'm sorry. Regardless of whether the Defense presents testimony or not, Your Honor?

THE COURT: Oh, I suppose if the Defense didn't present testimony, we would just have argument, one by the State and one by the Defense, and the Defense would have the last argument.

MR. WILLIAMS: That sounds reasonable to me, Your Honor.

MR. GOLDSTEIN: Judge, I have nothing on which to base my opinion, other than the normal trial situation, which Your Honor is well aware of, which would give the State opening and rebuttal. As far as how that would apply to this proceeding, I must

confess that I do not have that knowledge at this time.

It's something that apparently doesn't come up very often.

THE COURT: No, it doesn't.

MR. GOLDSTEIN: And because of the newly implemented system, Your Honor, the State will accept whatever the Court's ruling would be.

THE COURT: Well, the Court's ruling is as follows: If the Defense does not put any testimony on, there will be only two arguments, one by the State followed by one by the Defense. If the Defense does put testimony on, it will be as follows: The State will open. The Defense will follow. The State will have an opportunity to rebut only the argument by the Defense, after which, if it appears advisable to the Court, the Defense, upon application to the Court, may be allowed to rebut, only

surrebut, that is the rebuttal of the State, and then only to such argument so that the argument will be one by the State and one by the Defense only.

And unless special circumstances are pointed out, that will be the end of it.

MR. WILLIAMS: We object to that, Your Honor. I'm sorry. It's not a gratuitous objection, but that puts a really horrible burden on the Defendant, and I say the Defendant, in a manner of speaking.

THE COURT: All right.

MR. WILLIAMS: The burden's on Mr. Tarre and me to make that kind of decision, and I don't think that's what the law --

THE COURT: Well, how do you say --

MR. WILLIAMS: I say the Defendant should have the right to final argument on the matter of penalty before this jury under any circumstances, and not be

confronted with the dilemna of having to withhold from the jury information that might not meet the test of legal admissibility in the guilty phase, but might be pertinent in the penalty phase for the purpose of having that final argument, which the Court knows is perhaps the most important tactical right that a person charged with a crime has.

THE COURT: I don't know. Maybe you misunderstood what I said. I thought that's about what the Court had decided.

MR. WILLIAMS: Your Honor said if we presented evidence, the State would have rebuttal of our evidence and then possibly after the State rebutted our argument, that on application, the Defendant might be given the opportunity to surrebut the State's argument.

Well, Your Honor, it's a crap shoot I'm not willing to take.

MR. GOLDSTEIN: Judge, I think that what you have suggested is, in a sense, giving the Defense closing arguments anyway, except that it lies within the sound discretion of the court if it becomes necessary at the time, other than predetermined.

I would object to the Defense having opening argument and then rebuttal under any circumstances, as Mr. Williams puts it. That is not contemplated in the normal trial proceeding should the Defense put on any evidence, and I don't believe it would be contemplated under the penalty portion.

MR. WILLIAMS: I think it would be fair, Your Honor, if the court said regardless of the evidence presented there were two arguments, first the State and then the Defense, period.

That would give the State opening, give the Defendant closing.

MR. GOLDSTEIN: Well Mr. Williams, apparently it seems like he's now contradicting himself and throwing the State a bone and giving the State opening.

As Mr. Williams said earlier, closing argument is a very often needed trial strategy, which I think it's up to the Defense to decide if they want it or not.

MR. WILLIAMS: The difference, Your Honor, and I hate to belabor the point, without intending to resort to melodrama, the State is here to act as a conduit or for the purpose of attempting to do justice.

Mr. Tarre and I are here to try and keep this man out of the electric chair. That's the difference.

THE COURT: Well, historically, in any law case, the Plaintiff has opening and closing, but the legislature has seen fit to pass a statute which, applying to criminal cases only, that in the event that the Defendant does not put any evidence on, other than his own testimony, that the Defendant gets opening and closing in a criminal trial.

Now, the Court feels that this particular type of hearing is not a criminal trial. We've already had the trial, and it is a less formal proceeding and hearing; however, the court would like, if the Defense does not put any evidence on, other than the testimony of the Defendant, the Defense will have opening and closing.

MR. WILLIAMS: May I point one thing out to the Court, Your Honor?

I understand the court has ruled, but I would just like this once to have a moment to argue something in back of the Court's ruling, to call something to the Court's attention that probably wasn't considered.

Your Honor has made reference to the historical practice of giving the Plaintiff opening and closing. As we recall the procedure, it is because the Plaintiff has the burden of proof, and opening and closing is given to the party with the burden of proof.

In the procedure mandated by this new statute we're traveling under now, the Defendant has the burden of coming behind the State and proving mitigating circumstances.

So, unlike a criminal trial on the issue of guilt, the Defendant does have a burden of proof here.

THE COURT: I don't know if anyone has any burden of proof.

MR. WILLIAMS: But, Your Honor, the way the instructions that the court has already read to the jury preliminarily are phrased, it says, "Should you find one or more of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist."

THE COURT: That is right. That's what I got through saying. There is no burden of proof on anybody here. It's up to the jury on the whole thing.

The only thing we're here for now is to aid the jury in deciding these things and the aggravating circumstances must be shown beyond a reasonable doubt.

I don't think it even shows mitigating circumstances have to be that way.

MR. WILLIAMS: What is the Court's ruling?

THE COURT: Pardon?

MR. WILLIAMS: What is the Court's ruling as to the order of argument?

THE COURT: Well, I'm -- you have convinced me that in order for the Court not to -- in order for the -- to better insure that the Court doesn't commit error, the Court will adopt the same procedure in this hearing as in the trial, and if the Defense doesn't put any evidence on, except for the testimony of the Defendant, the Defense will have opening and closing.

Otherwise, the State will have opening and closing. Simple as that.

MR. GOLDSTEIN: Your Honor, my two witnesses are here. Can I just indulge the Court in about a five-minute recess at this time, so that I may speak with them briefly? I believe that will be necessary,

because there are certain other factors that they are aware of that I believe should not come to the attention of the jury, which could cause a mistrial and so forth.

THE COURT: All right.

If there is any danger of that, for sure, you better instruct them.

(Whereupon, a brief recess was taken, after which the following proceedings were had.)

MR. WILLIAMS: Your Honor, the prosecutor has two other witnesses whom he intends to call, the substance of both of whose testimony I know. The prosecutor and I would like to approach the bench without having to excuse the jury again, to get a ruling on the admissibility.

THE COURT: All right.

(Whereupon the following proceedings were held at the bench out of the hearing of the jury.)

MR. WILLIAMS: Your Honor, for the record, I have the prosecutor's file in my hand that contains a copy of the statement taken from one Joy Simn, who is the next witness the State intends to call.

The State intends to elicit testimony she heard the Defendant, Hargrave, say, in response to a question about his participation and the events which are the basis of the indictment, words to the effect, "I can always kill anybody without any feeling, just like I did before."

He also intends to call Janice Fraker, F-r-a-k-e-r, and elicit from her testimony that she heard the Defendant say he had killed someone once before, and it wouldn't bother him to kill again.

I object to that testimony from both of those witnesses, on the grounds it

does not meet any of the aggravating circumstances or factors which the jury is now impaneled to hear, and itwould just be highly prejudicial, particularly since the statements were uttered under circumstances that are unsusceptible of being properly tested in these proceedings on proper cross examination.

I ask the Court not to permit that kind of testimony.

MR. GOLDSTEIN: Judge, if you will look at E of the mitigating circumstances, I believe it is relevant to that point.

THE COURT: What is the number?

MR. GOLDSTEIN: Initial E.

THE COURT: E?

MR. GOLDSTEIN: E.

THE COURT: What's this got to do with that?

MR. GOLDSTEIN: It shows the lack of the presence of E. It shows the Defendant

did not act under extreme duress or domination.

THE COURT: There isn't any evidence in here that he did, really, unless you anticipate some of the other mitigating circumstances, but there actually is not evidence here yet, that I know of, to establish that is the case, that he was acting under duress or domination.

MR. GOLDSTEIN: Certainly, during the course of the trial in chief, Mr. Williams inferred numerous times that he was acting under the domination of Larry Karge.

In addition, Judge, I don't believe it's necessary, as I said before, that the State to be restricted to producing aggravating circumstances and the Defendant show mitigating circumstances.

Either side can show the presence or absence of either aggravating or mitigating. I am trying to show the absence of mitigating.

MR. WILLIAMS: In the interest of fairness in response to your last statement, I will elicit testimony concerning domination. I don't think that's dispositive. I couldn't allow your comment to go unanswered.

THE COURT: I understand.

Well, in addition to which actually I have felt that it is proper for the State to show the absence of mitigating circumstances, I ruled that way in the other one.

Overrule the objection.

(Whereupon, the discussion at the bench was ended.)

MR. GOLDSTEIN: The State would now call Joy Simn. Would you come up, please, Miss Simn? Step up here, please, and be sworn.

THE CLERK: Would you raise your right hand, please?

JOY SIMN

was called as a witness on behalf of the State, and after having been first duly sworn, was examined and testified on her oath as follows:

DIRECT EXAMINATION

BY MR. GOLDSTEIN:

Q Would you state your name, please?

A Joy Simn.

Q Would you speak up a little bit louder, please?

A Joy Simn.

Q Miss Simn, do you know Lenson Hargrave?

A Yes.

Q Do you see him here today?

A Yes.

Q Would you point to him, if you see him, please?

A Over there.

Q Indicating, for the record, the Defendant.

Did you ever have occasion to have a conversation with Lenson Hargrave in reference to a shooting that occurred at a U-Tote-M food store?

A Yes.

Q Do you recall when that conversation took place?

A It was after he was arrested for a case before --

Q Wait, wait.

MR. WILLIAMS: Your Honor, may I object to and reserve the right to make whatever motion is appropriate under these proceedings, later?

THE COURT: All right.

You have a right to reserve --

MR. WILLIAMS: And have the jury instructed to disregard Miss Simn's last comment?

THE COURT: All right.

The jury will disregard the witness' last comment.

BY MR. GOLDSTEIN:

Q Do you recall approximately what month it was?

A About July, August.

Q About --

A July to August.

Q Can you narrow it down any better than that?

A No, because first --

THE COURT: Answer the question.

THE WITNESS: No, not the date.

BY MR. GOLDSTEIN:

Q Where did the conversation take place?

A It was Larry's house.

Q Larry Karge's house?

A Yes.

Q Do you recall approximately what time the conversation took place?

A No.

Q Was it in the daytime or nighttime?

A In the daytime.

Q Daytime?

A Uh-huh.

Q Do you recall what Lenson Hargrave said to you at that time?

A Yes.

Q What was that?

A That he had killed a fellow, and that he would do it again if anyone was to be in his way.

Q Okay, thank you.

THE COURT: Cross examination?

CROSS EXAMINATION

BY MR. WILLIAMS:

Q Miss Simn, what is your relationship with Larry Karge?

A He's my fiance.

Q You were, if not his fiance? his girlfriend back at about the time these conversations took place, weren't you?

A Not really.

Q Oh?

A Because we were supposed to get married.

Q All right.

So, you have the same kind of close or intimate relationship with Larry Karge back then, didn't you?

A Yes.

Q And you know that Larry Karge is now charged with murder?

A Yes.

Q He's in jail awaiting trial?

A Yes.

Q And you believe that Larry wouldn't be in the trouble he's in, except for Lenson; isn't that true?

A I suppose so.

Q Larry was present during that conversation wasn't he?

A No.

Q He wasn't?

A No.

Q But you all were over at his house?

A Yes.

Q Where was Larry?

A He wasn't in the room with us.

Q Where was he?

A He was outside in the living room with his mother.

Q Who else was attending that conversation, besides you and --

A Only Lenson and myself, because I told Lenson that I wanted to speak to him alone.

Q You knew that from time to time, Larry and Lenson and other people got

together and did drugs together, didn't you?

A Yes.

Q And that was a fairly common occurrence, both at Larry's house and at Terry's place and at other places, wasn't it?

MR. GOLDSTEIN: Your Honor, it's certainly outside the scope of my direct and I don't see the relevance it would have.

THE COURT: Overruled.

You may answer.

THE WITNESS: Could you repeat this again?

MR. WILLIAMS:

Q Yes, ma'am.

My question to you is: Is that common or frequent occurrence at Larry's place with Terry Morton and at other places?

A It was frequent, but not that frequent.

Q I don't suppose you have any recollection, by any chance, whether on that day, at Larry's house, Lenson and Larry had been doing drugs together?

A Yes. They were doing drugs that day.

MR. WILLIAMS: Nothing further.

MR. GOLDSTEIN: Nothing further.

THE COURT: All right.

You may come down.

MR. GOLDSTEIN: You may step down. Thank you.

JANICE FRAKER

was called as a witness on behalf of the State, and after having been duly sworn, was examined and testified on her oath as follows:

DIRECT EXAMINATION

BY MR. GOLDSTEIN:

Q Would you state your name, please?

A Janice Fraker.

Q Janice, do you know Lenson Hargrave?

A Yes, I do.

Q Do you see him in Court now?

A Yes, I do.

Q Will you point to him, if you see him, please?

A (Indicating.)

Q Indicating, for the record, the Defendant, Lenson Hargrave.

Did you ever have a conversation with Lenson Hargrave?

A Yes, I did.

Q And on how many occasions?

A On one occasion.

Q Do you recall approximately what month this was?

A It was at the beginning of November.

Q Do you recall what day of the week or what date?

A No, I don't

Q Where did the conversation take place?

A It took place at my apartment.

Q And who else was present?

A Larry Karge.

Q What time of the day or night did this conversation take place?

A Late evening.

Q Did you ever hear Lenson Hargrave make a statement to you or in your presence about a shooting that occurred at a U-Tote-M food store.

A Yes, I did.

Q And what was it that Lenson Hargrave said to you about it at that time?

A He told me that he had killed once before and that it wouldn't bother him to kill again, and he proceeded to go into detail and tell me what had happened.

Q Okay. Thank you.

CROSS EXAMINATION

BY MR. WILLIAMS:

Q Miss Fraker, I'll be right with you. Just a moment. I want to ask you a question.

Miss Fraker, are you still Terry Morton's girlfriend?

A Yes.

Q And you were back at the time that these conversations took place, weren't you?

A Yes.

Q Miss Fraker, on the night in question, Terry wasn't present?

A No, he wasn't.

Q Do you have a recollection as to whether either Mr. Karge or Mr. Hargrave or perhaps you, yourself, had been using any narcotic drugs or marijuana or alcohol at your apartment that evening?

A On that evening?

Q Yes.

A No.

Q Nobody had been?

A No.

Q Was it a common occurrence for Terry and Larry to be using -- is there something you want to say?

A Excuse me, yes.

The were drinking beer. They went to get beer afterwards.

Q You knew Terry and Larry to be good friends, didn't you?

A Friends.

Q Did you ever spend any time with Terry and Larry when they were doing drugs together?

A Yes.

Q That conversation came right at a time shortly after Terry had been arrested for burglarizing a plant, hadn't he?

A Yes, sir.

Q And the subject matter of the conversation turned to the guy who had gotten Terry arrested, didn't it?

A Yes, it did.

Q And that was a guy named Bob Gooben, wasn't it?

A That's correct.

Q And Terry wasn't particularly happy with Bob Gooden, was he?

A I hadn't talked to Terry. I wouldn't imagine.

Q You hadn't talked to Terry about it?

A Terry was in jail. He had been arrested the day before.

Q Did you talk to Larry Karge about Bob Gooben?

A Before the night we're talking about?

Q Yes.

A I don't believe so.

Q Did you talk to Larry Karge about Bob Gooben that night?

Q The night you're talking about when Mr. Hargrave was present.

A Terry Morton wasn't present.

Q I said Larry Karge.

A Larry Karge, yes.

Q Who brought up the subject of Bob Gooben that night?

A I don't remember.

Q Do you recall what the conversation was?

A Yes, I do.

Q Tell the jury about it, Miss Fraker.

A Fine.

Supposedly, Terry Morton had been set up to be arrested when he robbed the drug store, and the person that had set him up was Bob Gooben, and the conversation

turned to the murder of Bob Gooben that night.

Q And wasn't it your desire and Larry Karge's desire to have this man, Gooben, killed for what he had done to Terry Morton?

A It was my desire?

Q I'm asking you, Miss Fraker.

A No. It was not my desire to have anybody killed.

Q And Larry Karge never mentioned it, either?

A Larry and Lenson discussed it.

Q Who brought it up, Miss Fraker?

A I don't remember.

Q And you played no part in that conversation at all? Is that what you're telling the jury?

A I made Larry promise me when he went home that he would go directly home.

MR. WILLIAMS: Nothing further.

MR. GOLDSTSEIN: Nothing further from the State.

Thank you, Miss Fraker. At this time, the State would rest.

MR. WILLIAMS: The Defendant will call Dr. William Corwin.

WILLIAM CORWIN, M.D.

was called as a witness on behalf of the Defense, and after having been first duly sworn, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q Tell the jury, please, sir, your name and your profession.

A William Corwin. I'm a physician, specializing in psychiatry.

Q Would you tell the jury, please, sir, your professional qualifications and credentials?

MR. GOLDSTEIN: Your Honor, the State will stipulate that Dr. Corwin is eminently qualified to testify about the subject matter he's going to testify about.

BY MR. WILLIAMS:

Q Dr. Corwin, is it not the case that you are -- how many prior occasions have you given testimony in the Criminal Division of the Circuit Court for Dade County or in any other trial level Court here in this area as an expert in the field of psychiatry and particularly forensic psychiatry?

A Many times.

Q Can you give us an approximation?

A I don't know. It would be hundreds. Perhaps more than that.

Q Dr. Corwin, you were requested by a Court back in January or February of this year to evaluate a person identified to you as Lenson Hargrave; were you not, sir?

A Yes. I was appointed by the Court.

Q And what was the date that you conducted that examination?

A I saw Hargrave on March 6, 1975.

Q Do you see the person who has been identified to you as Lenson Hargrave before the Court?

A Yes. I believe that young fellow over there.

Q This fellow here?

A I believe that's who he is.

Q Indicating, for the record, the Defendant, Hargrave.

Dr. Corwin, what did your evaluation and examination consist of?

A It was a typical psychiatric examination, where I questioned the patient, observed him, asked him a variety of questions about his behavior, his background, whether there were or were not

certain types of symptoms that one looks for in different types of mental illness.

Q You, sir, did not conduct the kind of psychiatric testing that would normally be done by a clinical psychologist, such as the intelligence test or projective test?

A That would be in the field of psychological examination.

Q Putting aside, please, Dr. Corwin, questions concerning the classic Right-Wrong Test and McNaughton's Rule --

A Yes.

Q -- did you arrive at any conclusions concerning the emotional state or condition or the state of the Defendant's personality, as such?

A Yes. I felt he was suffering from a type of condition which is called personality disorder of the anti-social type.

Q -Dr. Corwin, has that condition that you've just described to the jury, formerly been known by other designations or labels before it was kind of updated by the profession?

A Yes. Many years ago, it was known as constitutional psychopathic inferior, and then it was called psychopathic personality. Then it was called sociopathic personality, and the last few years, the American Psychiatric Association has labeled them as anti-social personality.

Q Did you determine, on the basis of your examination, whether there were any causative factors of an external nature that contributed to that condition, or which enhanced or magnified that condition?

A The exact cause of these conditions is not known. They're regarded as being lifelong duration, oftentimes

beginning in the earliest years of life, and they represent disturbances in the personality or the development, particularly as it relates to the society in general.

There are, of course, additional stresses that can aggravate a situation, such as drug abuse or other kinds of emotional disturbances.

Q Did you determine, Dr. Corwin, in the case of the Defendant, Hargrave, that any of those other stresses seemed, within the limits of reasonable medical certainty, to be present?

A Well, he gave a history of rather extensive drug use from the age of fifteen on.

Q Was that history consistent with your finding?

A Yes. It would be consistent with my finding.

Q Dr. Corwin, if you had to select one word in particular kind of as a generic term to describe the nature of the Defendant's behavior within the framework of his anti-social personality disorder, what word, what adjective would you pick?

A It would be difficult to pick one adjective.

Q Well, did you find that there was any particular behavioral pattern?

Strike that.

Did you arrive at any conclusion with regard to the Defendant's impulsivity?

A Yes. I felt that he tended to be, as many of these personality disturbances are, they tend to be impulsive to do things without thinking about them, without reasoning.

They often times do not learn from their experience. They repeatedly tend to get into trouble with the law. Oftentimes,

they'll give up work impulsively or for no particular reason. They fail to follow through in terms of consequences.

Q Dr. Corwin, did your examination of the Defendant give rise to any findings concerning his relationships with any of his peers?

A Well, he felt that he tended to allow people to use him. He felt that people took advantage of him. I think he felt that he went out of his way to be helpful to people, particularly to those whom he felt were his friends.

Q Did you have any objective or clinical reason to disbelieve the Defendant when he said that?

A No.

Q Did he seem to be malingering or faking?

A No, not at the time I saw him.

Q Would it be a fair statement to make, Dr. Corwin, within the limits of reasonable medical and psychiatric certainty, that a person possessed of the --

MR. GOLDSTEIN: Objection to the leading.

MR. WILLIAMS: I'm asking a hypothetical question.

MR. GOLDSTEIN: He's saying, "Would it be a fair statement to make?" and now, he's going on --

THE COURT: Sustained.

BY MR. WILLIAMS:

Q Dr. Corwin, given a person possessed of the character disorder or behavior disorder that you have found to reside in the Defendant, Hargrave, and given the concomitant impulsivity that you found, and given the history of drug use that you found and given the history that

you've taken from him of his feelings of being used by certain people in his life, can you arrive at any conclusion, within the limits of medical certainty, as to the extent to which this person, under those circumstances, would be subject to being dominated by those people in his life?

A He could be dominated. It represents a possibility.

MR. WILLIAMS: Nothing further. Thank you, Doctor.

MR. GOLDSTEIN: I have no questions.

Thank you, Doctor.

THE COURT: Thank you, Doctor. You're excused.

MR. WILLIAMS: Mrs. Hargrave?

GERALDINE P. HARGRAVE

was called as a witness on behalf of the Defendant, and after having been first duly sworn, was examined and testified on her oath as follows:

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q Mrs. Hargrave, for the record, ma'am, state your full name, please.

A Geraldine P. Hargrave.

Q Talk loudly enough for the jury to hear you, Mrs. Hargrave.

A Geraldine P. Hargrave.

Q Are you Lenson's mother?

A Yes, sir.

Q Mrs. Hargrave, you know Larry Karge, don't you?

A Yes, sir.

Q Do you know him to be or to have been a close associate of your son, Lenson's?

A Yes, sir.

Q For how long has that been true?

A I would say five or six years.

Q Did you have the opportunity to regularly observe Lenson and Larry together?

A Yes, sir.

Q Did you have the opportunity to observe Lenson's behavior following his having been in Larry's company for a protracted period of time?

A Yes, sir.

Q Mrs. Hargrave, tell the jury, please, ma'am, what observations you made about the relationship between Lenson and Larry.

A It seems as though when Lenson was around Larry or Larry would come to get Lenny, I had no -- I had nothing over him at all. It's just like he was a magnet. He drew him away from me.

Q Don't say "he."

A Larry. Larry drew Lenny away from the house, as if it was a magnet that was drawing him constantly. I had no control over him. His father had no control over him whatsoever. Larry was always the one that dominated everything.

Q Were there ever times when you asked Lenson to stay away from Larry?

A Many times.

Q Did you ever instruct your son in a maternal fashion to stay away from Larry?

A I did.

Q Did it do any good?

A No, sir.

Q Excuse me. Do you have any other children, Mrs. Hargrave?

A Yes, sir. I have three.

Q Three others?

A Yes, sir.

Q Do you work, ma'am?

A Yes, sir.

Q For whom are you employed?

A City of Miami Beach Police Department.

Q The gentleman seated over there is your husband?

A Yes, sir.

Q Does he work?

A Yes, sir.

Q How is he employed?

A He's employed for the Wackenhut Security firm.

Q And the two of you together have contributed to the mutual support and rearing of your children?

A Yes, sir.

Q Mrs. Hargrave, is this the first time that Lenson has ever been in any trouble?

A Yes. Yes, I would say real trouble.

Q Has your son ever been in trouble with the police before, Mrs. Hargrave?

A Yes, he has.

Q On any of those earlier occasions when your son has been in trouble with the police before, Mrs. Hargrave, has Larry Karge been involved?

A Yes, sir.

MR. WILLIAMS: Nothing further.

CROSS EXAMINATION

BY MR. GOLDSTEIN:

Q Mrs. Hargrave, you said you have another son. Would that be Elmer Hargrave?

A Yes, sir.

Q Has Elmer ever been in trouble with the law before?

A Yes, sir.

Q How old is Elmer?

A He's nineteen, or will be nineteen. He's eighteen and a half.

Q Is he also close with Larry Karge?

A Yes.

MR. GOLDSTEIN: Nothing further.

REDIRECT EXAMINATION

BY MR. WILLIAMS:

Q As a matter of fact, Mrs. Hargrave, Larry Karge and Elmer appeared together for a while, didn't they?

A Yes, sir.

Q That was right before Elmer got arrested and sent to the State Reformatory for Boys, wasn't it?

A Yes, sir.

Q Was Larry Karge involved in that?

A But definitely he was.

MR. WILLIAMS: Nothing further.

MR. GOLDSTEIN: Nothing from the State.

THE COURT: All right.

You may come down.

MR. WILLIAMS: The Defendant rests, Your Honor.

THE COURT: Any rebuttal from the State?

MR. WILLIAMS: Before the Defendant rests, could the jury be excused for a moment?

THE COURT: The jury will retire to the jury room.

(Whereupon, the jury retired from the Courtroom and the following proceedings were had.)

MR. WILLIAMS: Lenson, come forward.

Your Honor, I have discussed with the Defendant the pros and cons, the various merits and demerits of his taking the stand and testifying in his own behalf, in this penalty proceeding.

It is my judgment that it would be against the Defendant's better interest for him to do so. Again, we have discussed that matter. The Defendant has expressed agreement with my judgment.

I would like the Court to make what it considers an appropriate inquiry to satisfy the Court of the fact that the Defendant understands these proceedings and the significance of it and agrees with the decision that he should not testify.

THE COURT: Mr. Hargrave, you've heard what your attorney said. Do you agree with what he has just said?

MR. HARGRAVE: Yes, Your Honor, I do.

THE COURT: Do you understand the gravity of these proceedings?

MR. HARGRAVE: Yes, sir.

THE COURT: Do you understand that you have a right to testify in your own behalf?

MR. HARGRAVE: Yes, sir.

THE COURT: Just as you have the right not to testify. Do you understand that you have the right to do either and you have discussed this matter with your attorney?

MR. HARGRAVE: Yes, sir, we have.

THE COURT: And you say "we." Does that mean your father and mother, too?

MR. HARGRAVE: No. My attorney and I.

THE COURT: Your attorney and you have discussed this matter, and it's your desire not to testify in this matter?

MR. HARGRAVE: Yes, sir.

THE COURT: All right.

You may be seated.

MR. WILLIAMS: Under the circumstances, Your Honor, the Defense will rest and we will so announce that when the jury returns.

THE COURT: All right.

MR. GOLDSTEIN: Judge, if we're going to go right into argument, I would ask, as long as the jury's out, just a couple of minutes to get a drink.

THE COURT: I don't know whether it's necessary to limit anybody. I presume everybody is going to be brief. The testimony has been brief.

MR. WILLIAMS: Ten, fifteen minutes.

THE COURT: Yes, and I'll instruct the State that in the, in your opening, you had better cover your position thoroughly, because the Court will preclude you in

closing from repeating anything you've already said. You'll be restricted in closing strictly to rebuttal of anything brought out by Mr. Williams that was not, that you did not have the opportunity the first time around.

MR. WILLIAMS: Can we have an apportionment of the time by the State so that the Court may not be --

MR. GOLDSTEIN: Not knowing what Mr. Williams plans to argue --

THE COURT: No. I think I have made enough limitation on it, even though it is not pinpointed as to the time.

All right.

Five minutes.

(Wherepon a brief recess was taken, after which the following proceedings were had.)

THE COURT: All right.

Bring the jury in.

MR. GOLDSTEIN: Do we have a time limit?

THE COURT: We didn't have a time limit. If you think we should have a time limit --

MR. GOLDSTEIN: I don't think it's necessary. We'll be brief anyway.

THE COURT: You agree on a time limit and I'll be happy to go along with it.

MR. GOLDSTEIN: I don't think it's necessary.

(Whereupon, the jury returned to the Courtroom, and the following proceedings were had.)

MR. GOLDSTEIN: May it please the Court, Mr. Williams, Judge, I don't think the Defense has formally rested in the presence of the jury.

MR. WILLIAMS: I'm sorry. The Defense rests in the penalty phase of these proceedings.

THE COURT: All right.

MR. GOLDSTEIN: Ladies and gentlemen, we come now to the sentencing portion of the proceedings. I don't attempt to try and figure out what's going on in the minds of each of you. I know what's going on inside my own mind.

It isn't often that a prosecutor is asked to come before a jury in a situation like this and make a recommendation or ask the jury for a particular recommendation, but it does happen and this is one of those times.

Fortunately, the law has set out by statute certain guidelines to make your decision easier. Well, certainly, it is not an easy decision, regardless; but nevertheless, certain criteria have been devised, and what I would like to do at this point is read the criteria to you and analyze each one briefly with the evidence

that you've heard, either the evidence just recently submitted during the sentencing portion and also any evidence that is applicable from the trial in chief that you've heard already.

As to the aggravating circumstances, the Court will instruct you, as it has already done and will do again, the list of aggravating circumstances to consider.

The first one, A, the capital felony was committed by a person under sentence of imprisonment. That circumstance does not apply in this case. It does not exist.

B, The Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. That also does not apply.

C, the defendant knowingly created a great risk of death to many persons. Under the facts as we know it, there was not such

a great risk of death to many persons. So, that does not apply.

D, the capital felony was committed while the Defendant was engaged or was an accomplice in the commission of or in the attempt to commit or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping or aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb.

Obviously, this aggravating circumstance does apply, because this capital felony was committed while the Defendant was engaged in the attempt to commit a robbery. So, this is present in our facts.

E, the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. This would be a matter subject to

your own interpretation as to whether or not Lenson Hargrave killed Joseph Jones just prior to him leaving the store in order to kill Joseph Jones so that he could make his escape or prevent a subsequent arrest.

F, the capital felony was committed for pecuniary gain. I don't think there is any question but that that was the primary purpose Lenson Hargrave went in that store to begin with.

G, the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. I don't believe that is present. I don't believe that is applicable to this case.

H, the capital felony was especially heinous, atrocious or cruel. I believe that this is definitely present and probably the strongest that the jury should

consider in argument on that point, and I don't think much argument is necessary, because each of you remembers the facts and certainly this decision lies among you, but the killing of Joseph Jones was extremely senseless and unnecessary, and I think that is the main point of that particular aggravating circumstance.

When Lenson Hargrave went in to rob Joseph Jones to take the money from the register, he couldn't get it open. It was at this point, according to the confession that Lenson Hargrave gave that Lenson Hargrave says he was scared and aggravated at that point and then he shot Joseph Jones, not because Joseph Jones was trying to go for a gun and in some way brought it upon himself, because Joseph Jones had aggravated Lenson Hargrave, because he now couldn't get what he wanted.

He couldn't get what he had gone in there to get. Also, the manner in which the killing was done. Once Joseph Jones was already shot and lying wounded on the floor, Lenson Hargrave then found it necessary to come back, after coming back around the corner, he found it necessary to lean over the counter and put the final bullet in Joseph Jones' head.

You're going to be instructed as to certain mitigating circumstances that you should look for, and if present, apply and weigh against the aggravating circumstances that you find to exist.

Mitigating circumstances are:

A, the Defendant has no significant history of prior criminal activity. We have heard, up to this point, nothing. I can't argue that point to you.

B, the capital felony was committed while the Defendant was under the influence

of extreme mental or emotional disturbance. That is, again, something that is subject to interpretation. I believe that Lenson Hargrave was not acting under any extreme mental or emotional disturbance.

You heard the testimony of the two doctors tell you that Lenson Hargrave is what they call an anti-social personality. There wasn't any question that he knew what he was doing and insanity was not an issue.

Dr. Sylvester stated that Lenson was a rebellious individual. In fact, the guard position that he had as security guard is especially attractive to Lenson Hargrave because of the hazardous nature of such a position. It is part of his personality to seek out this type of thing, hazardous nature.

You will have to rely on your own recollection of what the doctor said to determine whether he was under emotional disturbance. I don't feel there was any emotional disturbances as such.

C, the victim was a participant in the Defendant's conduct or consented to the act. I don't think there is any question that the victim did not consent to this act.

D, the Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. Well, we know that not to be true.

The Defendant acted under extreme duress or under the substantial domination of another person. It was intimated to you that during this trial that Larry Karge dominated Lenson Hargrave. There was no evidence shown of that particular point. So, what you have is just a suggestion on

the part of Mr. Williams. But more recently, you did hear from Dr. Sylvester who told you after he had also examined or evaluated Larry Karge, that in his opinion, it was just the opposite, that it was Lenson Hargrave who dominated Larry Karge.

He said that he felt Larry Karge would be able to plan such a robbery, but that Larry Karge would not have what it takes to commit this act, but Lenson Hargrave does have what it takes, and I use the word "does" have what it takes, rather than did have it because it's the State's contention that he still has what it takes and I think that this is most clearly shown by what Joy Simn and Janice Fraker and Vallie Morton told you.

If you recall, Vallie Morton, Terry Morton's sister, said when she testified in the trial, when asked by Mr. Williams didn't she think it was unusual

that Lenson Hargrave would start talking about this murder, she said it appeared or looked as though he enjoyed talking about it.

Joy Simn, she said that Lenson told her that he can kill without feeling like he had done before, referring to the U-Tote-M murder.

Janice Fraker said Lenson Hargrave had told her that he killed someone once and it wouldn't bother him to kill again.

Those three expressions of Lenson Hargrave I think are probably the most significant part of all the evidence you heard toward the sentence portion, because it goes to his personality, his state of mind.

Dr. Corwin stated to you his evaluation of Lenson Hargrave was one that indicated to him that he is such that he would not learn from his experience and

would be in frequent trouble with the law. I think that E, as I read earlier, the Defendant acted under extreme duress or substantial domination of another person, is obviously not present.

The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. There is no evidence that his ability was impaired substantially or otherwise. There is no testimony he was acting under the influence of drugs, marijuana or anything else or alcohol.

G, the age of the Defendant at the time of the crime. I believe the age of the Defendant was nineteen. Your duty is going to be examine the testimony, look for any aggravating circumstances that you have found. I have suggested to you what I feel are present in this case.

Weigh that against any mitigating circumstances that you find, and then, based on that, come up with a recommendation to the Court.

Because of the comments I have previously made, because of the fact that this crime was senseless and needless, because of the fact that Joseph Jones apparently offered no resistance, yet was killed anyway, because of the fact that Lenson Hargrave has boasted so frequently about his having killed somebody and about his being able to kill without feeling and about being able to kill again, because of all those things, the State urges you to return a recommendation to this Court of death.

Thank you.

MR. WILLIAMS: Ladies and gentlemen, Your Honor -- I take the liberty of addressing my remarks to you, as well as

the jury, because although it is your province to make a recommendation, and although I am certain that His Honor will do what the law expects of him and place great weight upon your recommendation finally, Your Honor, it is you who has to make the ultimate decision, and so as I said, I take the liberty of arguing not only to the jury, but to the Court.

About three thousand years ago, twenty-five hundred years ago, the most powerful civilization then in existence was the City State of Sparta, which as I'm sure most of you know, was the forerunner to classical Greece.

In Sparta, when a child was born defective, they took the child and took it out to a plain and abandoned it and left it there to die. They thought that was the way to purge their society of defective, undesirable people.

Lenson Hargrave is a defective child. You have found him to be a murderer, and that, by definition, makes him defective.

But what's more, you have heard testimony now of the inner workings of Lenson Hargrave, what makes him tick, how he functions, what motivates him, and it is there, as much as in the fact that you, by your judgment, place on him the label of murderer, that he is defective.

Don't misunderstand me, by the way, when I make reference to your judgment. You have, each of you, done your duty, I think remarkably. You have done it properly. You have done what your consciences have dictated and what the evidence has induced you to do.

My comment is not my indictment of you. It is a recognition of the level to which we have gotten now.

This boy -- and he really, in the last analysis, is just a boy, is a child who just can't make it as he presently exists. Nobody decries or bemoans the death of Joseph Jones more than I. He died in a horrible fashion.

Nonetheless, it rests with you now to make a decision as to whether your conscience collectively is in such a condition as to urge to the Court, and whether the Court's conscience is in such a condition thereafter to feel that it's time to revert to Spartan tactics and put this kid on an electrically charged plain and leave him there to die.

Dr. Sylvester spent a great deal of time with Lenson Hargrave, and he told you of his findings. He told you that he found this kid to be somebody whose intelligence came within the lower reaches of intellectual normality. He described him as being a dull-normal.

You can call upon your collective experience as jurors to know what it means to be a person of dull-normal intelligence.

Dr. Sylvester told you that he found to be operating within the mind and, if you will, the soul of this boy, factors which caused Dr. Sylvester, in his clinical judgment, to strongly suspect that this boy might have brain damage.

He told you that he found at work in Lenson Hargrave emotional factors, that to all intents, render him unable to deal normally with society and with what is going on around him on a day-to-day basis.

His words were -- and I'll hear them for a while. His words were that Lenson Hargrave is striking back, because he doesn't know what's wrong with himself.

You heard evidence from Dr. Sylvester that Hargrave's condition is such as to render him suggestible and susceptible to

being dominated. Even though Dr. Sylvester told you that in his judgment, Hargrave was the more dominant of the Hargrave-Karge pair, you know by now that it was Larry Karge who sent this kid in to do his dirty work and you know that this kid didn't have either the intelligence or the strength or the moral knowledge or the guts to resist doing it, because you were told by Dr. Sylvester that what makes this kid tick is a need to be accepted, to promote himself, to raise his stature in the eyes of his peers.

Dr. Sylvester used words to characterize this boy's personality problems like disruptive behavior, deviant behavior, hostility, isolation, loneliness, instability, and a liking for danger and aggressive excitement.

He told you, I think clearly, that in going into that store with a gun in his

hand, this kid was saying to himself, to Karge, and to the world, "If this is the only way that I can make myself a person and make myself a person whom you will look up to, instead of being the fat, ugly kid on the block, then that's what I'm going to do."

And he told you that the factors that are at work behind those eyes are factors that make resisting that kind of feeling and that kind of impulse almost impossible.

Hargrave's mother told you -- and yes. You finally heard it -- that for a long time, Lenson Hargrave and Larry Karge have been a pair and that has been bad time, a time of grief, a time of disrupted family, a time during which the lives of all of these people have been just barely tolerable and nothing more.

And what were the words that Mrs. Hargrave used to describe to you the

relationship between her son and Larry Karge? Karge was a magnet. You consider that, ladies and gentlemen, and you please, Your Honor, consider that and tie it into what Drs. Sylvester and Corwin told you and think whether we are dealing with a person who is the kind of person that the legislature had in mind when in its wisdom it saw fit to recreate the death penalty in this State.

Mr. Goldstein brought a couple of young ladies in here to try and suggest to you that Lenson Hargrave is a cold, calculated killer. I suggest to you these things: Consider the identities of the ladies whom he brought in. Larry Karge's girlfriend, who you know isn't too happy with Hargrave for Karge's sitting over there in the jail waiting to come before another twelve for which you can reasonable find, I believe, that she holds him responsible, and Terry Morton's girlfriend.

Terry Morton, who, himself, had recently been arrested and charged with a burglary of a drug store, after which mysteriously there was a discussion involving Larry Karge and Lenson Hargrave about killing the person who was responsible for having Terry Morton arrested, and you know, as between Terry Morton and Larry Karge on the one part and Terry Morton and Lenson Hargrave on the other, you know where the loyalty lies.

You know who were friends. You heard Terry Morton himself tell you that he and Larry Karge were friends, and you heard Terry Morton tell you he couldn't care less about Lenson Hargrave and wanted to burn him.

Who do you suppose it was on that night who brought up the subject matter of killing somebody who had gotten Terry Morton into trouble? I suggest to you that

you can find that it was Larry Karge, who by all accounts, is probably -- not probably, definitely the person ultimately responsible for the death of Joseph Jones.

Now, you are in a position to make Larry Karge ultimately responsible for the death of Lenson Hargrave.

Ladies and gentlemen, your alternative is to recommend to His Honor whether Lenson Hargrave be put to death or imprisoned in the State penitentiary with a requirement that he serve a mandatory twenty-five year minimum period, and Your Honor, the decision as to whether to do that ultimately rests with you.

When you stop and think about twenty-five years, stop and think about where you will be in twenty-five years. Think about where you, Your Honor, will be in twenty-five years, and then think whether you all are willing to take the responsiblity for

arriving at the judgment, and you, Your Honor, for imposing the judgment.

MR. GOLDSTEIN: Objection, Your Honor. I apologize for having to object at this time, but I think Mr. Williams is improperly making statements that it is not the jury that is going to arrive at any judgment.

It is the jury that is going to arrive at a recommendation. The Court shall arrive at a judgment.

THE COURT: Sustained.

MR. WILLIAMS: And do you, Your Honor, by your judgment, and do you, members of the jury, by your recommendation, want to take the chance that when twenty-five years have passed, that by then, even then there is nothing that can have been done to cure the defect to straighten out and righten the problems, the defective behavior, the inappropriate emotions that work behind the eyes of that boy over there?

There are people who firmly believe in the concept of an eye for an eye. I can't climb into your heads. I can't impose my morality on you. I wouldn't presume to try, but I can tell you this: It seems to me that we are at a point in time now when none of this is going to be doing yourselves or society or Lenson Hargrave or, for that matter, Joseph Jones, any good in the world by finding him to be an appropriate candidate for the imposition of the death sentence.

I don't envy you your responsibility, Your Honor. I am reasonably certain that I probably could not come to grips with it myself, but I suggest to you that you have not seen beyond and to the exclusion of a reasonable doubt, the presence of the aggravating circumstances or the absence of the mitigating circumstances that would judicially require you to impose the death sentence on this boy.

In the last analysis, Your Honor, we're dealing with a human being, who at the age of nineteen, is possessed of defects and problems which are not his fault and which obviously are more than he can cope with, and if you recommend Lenson Hargrave be put to death, and if you, Your Honor, enter that judgment, you are, in effect, killing a person for factors and circumstances for which he does not have the ultimate responsibility and maybe, I suggest to you, that it is a higher authority that all of ourselves which has instilled or planted or imposed those defects upon him to begin with, and maybe when you consider Dr. Sylvester's words, "A person having to strike back because he doesn't know what's wrong with him," maybe that's punishment enough.

MR. GOLDSTEIN: Ladies and gentlemen, just one closing remark.

It's been suggested that Lenson Hargrave committed this robbery and this murder on an impulse, because this is the way he feels he can become a person. It's been suggested that Lenson Hargrave seeks danger and adventures from situations such as this, and it has also been suggested that Lenson Hargrave felt the need to get himself into the good graces of his peers of society, and I submit to you that there is only one way that you can tell this Court and the people of this community that there is no place in this society for people who feel like Lenson Hargrave, people who feel that killing another human being senselessly and needlessly and viciously, have any place in this society.

THE COURT: Ladies and gentlemen of the jury, the sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and the law

as given you by the Court in the charges preceding and following the sentencing proceeding.

Your verdict must be based upon your finding of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances found to exist.

Based upon these considerations, you should advise the Court whether the Defendant should be sentenced to life imprisonment without the possibility of parole for twenty-five years or to death.

In these proceedings it is not necessary that the verdict of the jury be unanimous, but a verdict may be rendered upon the finding of a majority of the jury.

Should a majority of the jury determine that the Defendant should be sentenced to death, you should recommend an advisory

sentence as follows: We, a majority of the jury at Miami, Dade County, Florida, this 15th day of July, A.D., 1975, recommend the Court impose the sentence of death as authorized by Florida Statutes 775.02, Subsection 1, so say the majority.

On the other hand, if after considering all the law and evidence touching upon the issue of punishment, a majority of the jury determine that the Defendant should be sentenced to life imprisonment as previously defined to you then you should render an advisory sentence as follows: A majority of the jury advise and recommend to the Court that it impose a sentence of life imprisonment upon the Defendant.

The law requires that seven or more members of the jury agree upon any recommendation advising either the death penalty or life imprisonment without possibility of parole for twenty-five years.

You will now retire to consider your recommendation, and when seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned into Court as we did in the first stage of this trial.

Now, retire to the jury room to consider your verdict.

(Whereupon, at 6:05 p.m., July 15, 1975, the jury retired from the Courtroom to consider their recommendation of an advisory sentence and at 6:25 p.m., of the same day, the jury returned to the Courtroom and the following proceedings were had.)

THE COURT: Members of the jury, have you reached a verdict?

THE FOREMAN: We have, Your Honor.

THE COURT: Hand it to the clerk.

Publish it.

THE CLERK: Circuit Court of the Eleventh Judicial Circuit of Florida, in

and for Dade County, Case Number 75-118A, the State of Florida versus Lenson Alfred Hargrave. Advisory sentence for the capital crime of first-degree murder. We, the majority of the jury at Miami, Dade County, Florida, this 15th day of July, A.D., 1975, recommend that the Court impose the death sentence as authorized by the Florida Statute 775.2, Subsection 1. So say the majority, S.B. Berryman, Foreman.

THE COURT: Poll the jury, and ladies and gentlemen, as your name is called, when you answer yes, you are just answering that a majority of the jury has made this recommendation. You will not be saying that that was your vote. Do you understand that?

Poll the jury.

THE CLERK: Ladies and gentlemen of the jury, as I call your name, if this was the advisory sentence of seven or more of you, answer yes. If it was not, answer no.

Reba Guyton:

MRS. GUYTON: Yes.

THE CLERK: Pamela Hudson?

MS. HUDSON: Yes.

THE CLERK: Nancy Lazarus?

MS. LAZARUS: Yes.

THE CLERK: David Oliver?

MR. OLIVER: Yes.

THE CLERK: Kaylene Hughes?

MS. HUGHES: Yes.

THE CLERK: James Clements?

MR. CLEMENTS: Yes.

THE CLERK: Jane Lentz?

MS. LENTZ: Yes.

THE CLERK: Lindberg Maine?

MR. MAINE: Yes.

THE CLERK: Scott Berryman?

MR. BERRYMAN: Yes.

THE CLERK: Linda Pearson?

MS. PEARSON: Yes.

THE CLERK: William Huckins?

MR. HUCKINS: Yes.

THE CLERK: Jackson McKinney?

MR. McKINNEY: Yes.

THE COURT: Now, ladies and gentlemen, before I let you go, I want to make sure that the record reflects if, which I believe is the case, but I will have your foreman explain it.

The Court notices and did notice when you presented the Court with the two verdict forms that on the verdict form which would have been a recommendation of life imprisonment, the foreman's signature appears, appeared there on or parts of it at least, and then there are two lines apparently striking it out with the foreman's initials above that.

Does the Court correctly understand that that means that form started to be returned erroneously and was corrected by the manner in which the name

of the foreman has been struck out and the initials of the foreman?

THE FOREMAN: It was an erroneous signature, yes.

THE COURT: All right.

Ladies and gentlemen, you have conscientiously served for the best part of four days on this case. You have had a difficult matter to decide, particularly the last issue concerning the recommendation.

I know that this case has been an inconvenience at least for many of you. I realize that you were originally summoned for one week, and you are almost halfway through the second week.

I sympathize with you. I know also and have remarked on it before, that I apologize for the fact that you have done considerable waiting for other people that are involved in this trial; however, I hope

you understand that in a matter such as this, everything must be done by the Court and by the other participants, attorneys and so forth, to make sure that everything is done correctly as much as possible, and in order to do that, it involves considerable discussion on the part of those of us who are trained in the law and decisions to be made by the Court, decisions to be made by the attorneys as to how they're going to proceed with their cases.

All of that is necessary.

Actually, this case, for the type of case it was, has been comparatively short. There are many cases of this nature that are much longer than just four days.

With that, I thank you for your attendant on this case and your attendance all of last week, even though it wasn't on this case.

At this time, I am going to discharge you from any further attendance on the Court. If any of you are waiting to see what the Court is going to do, I must disappoint you. The Court has a little more complicated procedure to go through than you did.

Whatever decision the Court makes -- not whatever decision. The Court must put in writing its reasons for making the decision, and that poses a little more complication, which the Court will take under advisement, and perhaps in a couple of days, the Court will decide that.

With that, all of you are excused. Thank you again.

(Whereupon, the jury was excused, and the following proceedings were had.)

MR. TARRE: Your Honor, on behalf of the Defendant, we would ask the Court to extent [sic] the time within which to file

a motion for new trial to the maximum of fifteen days.

The rules permit us four days within which to file a motion.

THE COURT: Granted.

The Court proposes to pass sentence this coming Friday at 1:00 o'clock, unless its inconvenient.

MR. WILLIAMS: Your Honor, this Defendant has not previously [been] convicted of a felony. I believe that -- I'm not certain whether the capital sentencing procedure excludes the presentence investigation requirements.

THE COURT: I believe it does.

MR. WILLIAMS: Whether it is expressly excluded or not, I would ask that the Court order the conduct of a presentence investigation before sentencing.

THE COURT: There is a rule.

MR. WILLIAMS: Your Honor, Rule 3.710 of Florida Rules of Procedure.

THE COURT: If these are the latest rules, they were adopted at which time when there was no such provision for -- no, I'm wrong. These particular rules were adopted in February of 1973; however, this particular rule may have been devised at a time when there was a mandatory death sentence or mandatory life sentence, wholly at the discretion of the jury, not the Judge.

Therefore, I don't know whether this is right.

MR. WILLIAMS: Your Honor, under any circumstances, I frankly -- I'm not certain when the legislature enacted these new proceedings, that they made any statutory provision. I do know the Supreme Court, or at least one District Court that pertains to sentencing is superseded by the rules.

The rule does say in all cases in which the Court does not have the discretion, and aside from everything else, not that conviction for any capital felony is an unsubstantial matter, but certainly dealing in a case like this where the Court has to make the kind of a decision it's going to, I certainly think the Court would be happy to have the guidelines of a presentence investigation.

MR. GOLDSTEIN: Judge, do I understand you to say you have the '73 rules?

THE COURT: Well, it says 1975. I don't know if there have been any changes since then. I don't think so.

MR. GOLDSTEIN: I'm not aware of any as it would pertain to presentence investigation reports, not in the last six months.

THE COURT: But there is very little, if any of the ordinary presentence report

that would be relevant to what the jury and the Court are supposed to consider in this matter concerning mitigating and aggravating circumstances.

Do we have any late amendment to the rules that you know of concerning presentence reports?

The Court will be in recess for five minutes.

(Whereupon, a brief recess was taken after which the following proceedings were had.)

THE COURT: Well, the Court is going to set the sentencing for Friday at 1:00 o'clock. In the meantime we'll look for more -- try to find out more about any new statutes and rules. I just feel confident that I have read somewhere not too long ago, a new statute or something that sets forth this, and certainly, the intent of the statute on this bifurcated trial

doesn't seem to be intended for presentence investigative reports.

So, we will tentatively set the sentencing for Friday at 1:00 o'clock. I don't know what date that would be.

THE CLERK: 19th, Your Honor.

THE COURT: And in the meantime, if the Court determines that there should be a presentence report, we will then -- we'll just have to have one. That's all.

Because of the hour, I don't think we have the opportunity to find the information we need one way or the other.

The Court is in recess until 9:00 o'clock tomorrow morning.

(Whereupon, the trial was concluded.)

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA - CRIMINAL DIVISION

No. 75-118-A

STATE OF FLORIDA,

Plaintiff,

vs.

LENSON HARGRAVE,

Defendant.

- - - - - - - - - - - - - - - - x

1:00 p.m. Friday
July 18, 1975
Metro Justice Building
Miami, Florida

The above entitled case came on for hearing on SENTENCING before the Hon. Gene Williams, Circuit Judge, pursuant to notice.

APPEARANCES:

STEVE GOLDSTEIN, ESQ.
Asst. State Attorney
On behalf of Plaintiff.

DOUGLAS L. WILLIAMS, ESQ. and
MICHAEL S. TARRE, ESQ.
On behalf of Defendant.

Thereupon --

THE COURT: Lenson Hargrave.

MR. TARRE: Your Honor, I don't think there is any argument about the motion to have him declared indigent and given permission to proceed in forma pauperis.

Judge, Rule 37.10 of the Florida Rules of Criminal Procedure reads:

> "In all cases in which the court has discretion as to what sentence may be imposed, the court may refer the case to the probation and parole commission for investigation and recommendation. No sentence or sentences other than probation shall be imposed on any defendant found guilty of a first felony offense, or found guilty of a felony while under the age of eighteen years until after such

investigation has first been made and the recommendation of the commission received and considered by the sentencing judge."

I have cases on this point. I don't think that it can be argued seriously that this Court does not have discretion as to the sentence. You certainly do. The Supreme Court, in a case I think involving your Honor, or from your Honor's court, Florida versus Dixon, et al., at 283 South 2d 1, at page 8 said:

"The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed, guided by but not bound by the findings of the jury."

I think that indicates, your Honor, that the sentence is discretionary.

Further, we would proffer to the Court that Lenson Hargrave -- and I don't think this is in serious dispute -- has not been convicted of a felony prior to this date of July 15, 1975.

We think, your Honor, that the Court is bound legally to order a presentence investigation.

Under the circumstances, I cannot see how it could -- Well, I can't see, really, the objection to ordering a presentence investigation. It certainly, if anything, could only help the Court in making its determination and findings of fact.

I just feel that every possibility, no matter how remote, must be explored. I feel that at this point to deny Lenson Hargrave a presentence investigation is just not warranted. It certainly, under the circumstances, would

be well founded, and we think that legally the Court is obligated to grant the motion.

MR. WILLIAMS: Your Honor, may we have leave to address ourselves to another element of the discretionary sentence under consideration?

THE COURT: All right.

MR. WILLIAMS: The Supreme Court of the State of Florida has recently said that insofar as proof of aggravating and mitigating circumstances is concerned in the course of the penalty phase of a bifurcated felony proceeding, aggravating circumstances must be proved to a reasonable doubt or beyond and to the exclusion of a reasonable doubt just as the facts pertaining to guilt in the guilt or innocence phase.

In the case before the Court, your Honor, the list of aggravating circumstances which has been prescribed by

the legislature, of that list there is no question but that four do not apply.

There seems to be no question that two do apply.

There is argument to be made as to whether a third aggravating circumstance, which is to say whether this offense was committed for any pecuniary gain, does apply.

On the other hand, with regard to the mitigating circumstances, we can find only one of the six which affirmatively does not apply, that being a question of whether the victim of this offense was a participant in the incident which gave rise to the homicide.

All the other mitigating circumstances at least -- at least arguably -- do not apply, and there is no burden to prove the applicability of the mitigating circumstances to the same degree that aggravating circumstances must be shown.

Moreover, we would point out to the Court that while the legislature has promulgated a list of six mitigating circumstances, the list of aggravating circumstances numbers seven, which gives rise to the appearance, in any event, that the criteria for determining the imposition of capital punishment are weighted against the defendant, and, as it were, in favor of the government, to the extent that more guidelines are provided for imposing the death penalty than for contraindicating the imposition of the death penalty.

Insofar as the merit of the sentencing itself is concerned, your Honor, we think that on the basis of a comparison of obviously applicable mitigating circumstances, as opposed to the questionably applicable aggravating circumstances, that as a matter of law it would be error for this Court to do

anything other than to avoid the imposition of the death penalty.

THE COURT: All right.

MR. GOLDSTEIN: Judge, just briefly, I feel that a presentence investigation, if it were going to touch upon the criteria listed in the statute, might be of some relevance. However, it does not.

The Court, I believe, is bound by the criteria outlined in the statute as to the aggravating and mitigating circumstances, and that has already been brought out before the Court and the jury, and a presentence investigation would not cover those items again, and since those are the only items which are to be considered in the passage of sentence, that is my feeling for believing that the presentence investigation would not serve any purpose, because I don't believe the Court can go outside of those criteria.

MR. TARRE: Let me just rebut for thirty seconds. I don't know that that is actually a fact. For example, what if the presentence investigation report indicated or found facts which would indicate that perhaps there is some mental instability in Lenson Hargrave, something that we do not know about.

We have not pursued his background, or an investigation into his background to such an extent that we can say with any degree of certainty that a PSI would not benefit him or benefit the Court, either way, in some small way, no matter how small that degree might be, it certainly couldn't harm, and I just really don't see the objection.

THE COURT: The Court has given it a lot of thought, and it appears to the Court that presentence investigations are not appropriate in a first degree murder case,

under our most recent statutes or even the prior statutes; that although possibly you might be able to technically read the language as indicating that there should be one, actually if so you would have to assume that the procedure set forth by the legislature in the jury trial, wasn't meant to be, or doesn't mean anything.

For the jury to be sent out to consider a recommendation to the Court, based on certain factors, and then have the Court go outside of that and have a completely new investigation made and the Court reach its findings under completely different guidelines than that used by the jury would be an exercise in futility, as far as the jury is concerned.

Weighing all of that and weighing all of the arguments in favor of having a presentence investigation, the Court is of the opinion that such is not in order and the motion is denied.

MR. TARRE: I have prepared an order, your Honor. I gave a copy to the State. I would like the Court to look at it. It may or may not be objectionable. If it is, the Court could advise us how to change it and we will do so.

THE COURT: That appears to be about the feeling of the Court in this matter.

Now, does the State care to answer the argument of the defense concerning the merits of the death penalty in this case, and the statements made regarding the mitigating circumstances and aggravating circumstances.

MR. GOLDSTEIN: Yes, your Honor, I would like to briefly respond. If I may find that list --

MR. WILLIAMS: While he is looking for that, your Honor, I would point out to the Court and ask the Court to take cognizance of the fact that various members of the

defendant's family are before the Court. I believe that one or more of them would like it if the Court, in its discretion, sees fit for them to have the opportunity to address brief comments to the Court before sentence is passed.

THE COURT: All right. And before we have argument by the State, perhaps.

First we have to have some other formalities.

MR. TARRE: If I may interrupt for this one matter, the motion to proceed in forma pauperis, will you grant that?

THE COURT: Yes.

MR. TARRE: I have prepared an order to that effect, for your signature.

THE COURT: Incidentally, will the Clerk tell me whether there has been an adjudication entered?

THE CLERK: No, your Honor, just a finding.

THE COURT: Enter an adjudication in accordance with the finding. I thought I had entered it previously.

Now, Lenson Hargrave, you have been found guilty and adjudicated guilty of first degree murder.

Is there anything to be said by the defendant or his representative to show legal cause why sentence should not be pronounced?

MR. WILLIAMS: We don't think, your Honor, that we can show legal cause, under the appropriate rules of criminal procedure, why sentence cannot be passed, other than the arguments we have previously made into the legality of the death sentence on the facts of this case.

THE COURT: All right. In that event then does the defendant or his representatives or members of his family, or otherwise, desire to make statement to the Court?

MR. WILLIAMS: Your Honor, the defendant has asked me to tell the Court that under the circumstances he doesn't really feel equipped or prepared to say anything to the Court, but I ask that the Court not consider the defendant's silence to be indicative of any kind of casual or cavalier attitude, but rather attribute it to the severe emotional strain under which the defendant presently obviously must be laboring.

THE COURT: Yes, the Court understands.

Now, does anyone else care to make a statement?

MR. WILLIAMS: Your Honor, the defendant's mother, father, one of his brothers, and the defendant's maternal grandmother are before the Court.

If any of you want to address the Court, come forward. I haven't spoken to them, your Honor.

THE COURT: Swear them.

(Thereupon Geraldine P. Hargrave and Ida Fredericks were sworn.)

THE COURT: All right. State your name, please.

MRS. HARGRAVE: Geraldine P. Hargrave.

THE COURT: What is your relationship to the defendant?

MRS. HARGRAVE: Mother.

THE COURT: All right, you may proceed.

MRS. HARGRAVE: Your Honor, I have something to say in my son's behalf. Probably you don't think it is relevant to the case, but I think it is.

Several years ago this boy was in an accident. He had a brain concussion. He was in the hospital for ten days to two weeks. At that particular time my neurosurgeon said that it wasn't necessary that he should have any psychiatric help, it didn't seem necessary to him at that

time. The doctor's name is Dr. Yates, who is out here in Hialeah.

In my purse -- in 1967 this boy was in the hospital for two months -- and I would like your Honor to see these pictures, please. I don't think I could live with anything like that. It would kill me.

At that time the doctor said he didn't need psychiatric care. Believe me, I think he needed everything. I think he suffered enough, and if you wish, I could show you the remains of what is left on his body. It is something that I couldn't go through, and I don't think anybody else could go through. The burns are terrible. You know if you burn your little finger it hurts, and this boy suffered for two months. I used to see him in the whirlpool. They didn't have what they have now, like the Burn Center and things like

that. There was no such thing. They gave him a little bit of psychiatric care, but nothing like they have today. At that particular time you had to be worth money, and so forth and so on, and if you didn't have it, they didn't think it was necessary for them to do it.

I saw him when the bandages come off, and it was terrifying, the screaming and yelling. He was tortured, believe me. They gave him drugs to put him to sleep, and drugs for this and drugs for that, and I think that one thing, that the drugs had something to do with it, because it was so easy to go back to it again.

His home wasn't the greatest, I won't say that, but one thing, he had a roof over his head and he had food in his stomach. He went to school and he had a place to go every day and every night, and he wasn't thrown out. We tried. My

husband and I both tried. There was no doubt about it in our minds. And we tried so hard, but you can't be with them twenty-four hours a day, I don't care who you are. And we tried so hard. My husband would stay home at night and play games with him while I worked. And we both worked. My husband does not sit in bars and he doesn't spend his money on other women. He tired to work with the condition he had, and the education he had. He has a default too. He is hard of hearing in his right ear, and the government is not good enough, really, to do a good job for him and they can only put him out on a 10 per cent disability.

It is just a scratch and go down here. It is a continual thing. We tried, and we tried so hard, and this boy did too. It is just a sorry, sorry thing that he got mixed up in, with a boy in that

condition, that could worm him around his little finger, because he knew that he didn't have a car, he didn't have extra spending money, and he didn't have this, so he did the little extra things for him, and then when he wanted something done, call him "chicken" and "afraid", things like that, and get him on drugs, and then he wouldn't know what he's doing. And I sincerely think that that is exactly what happened, and I have every right to think that, because I know that's exactly what he did. He's not the kind that he can dominate, really, like the psychiatrist said.

That's all I have to say, your Honor.

THE COURT: All right.

State you name, please.

MRS. FREDERICKS: Ida Fredericks.

THE COURT: What is your relationship to the defendant?

MRS. FREDERICKS: I am the grandmother, the maternal grandmother.

THE COURT: All right, you may proceed.

MRS. FREDERICKS: Everything she said is absolutely true, because I was with her and with him, and I think that accident was the beginning of the whole thing. I know that too to be a fact.

I think he is worth rehabilitating because he's a good boy. I said a long time ago that he should be rehabilitated. He should have a fine education and everything, and if he's passed his tests here, the college tests, there must be another side to it.

Another thing, if they are going to take care of puppies and dogs, things like that, what's the matter with humans? They are here to stay, and we must take

care of them. I don't see any point in anything but rehabilitating this boy. I do not see death, I cannot see it, because he don't deserve that.

Everything she said is absolutely true. I can verify all of that myself. And I couldn't bear it myself to go to the hospital and see him many times. And he was cheerful through it all.

He's a Gemini and he's a dual personality. The other personality is gone, I am sure. And I think it is worth rehabilitating, because he's a smart boy.

Every one of the children are above average in intelligence, and I have had the little girl, his sister, for seven years, through the welfare, and you ask Spink, up at the William Jennings Elementary, what I have done for her. He called me to his office when she left that grade and went into junior, and he said I'd

done a marvelous job. I had help; I had to have help, because she was in a bad way. She was only about a year old when I got her. She didn't know anything. She needed training badly, and she got every bit of it.

She went through Junior High. You can ask Mr. Williams and Mr. McCray up there, and the man that's still up there, the principal, and you can ask Dale Bodie over at the Senior High. Everybody has the highest respect for that little girl. They said I've done a marvelous job. She still has a long way to go. She is insecure, as all these children have insecurity, every one of them, even he. I know it. I can tell it. They feel let down. They feel terribly let down, and I think this would be a terrible thing, because there's three other children, and they are going to profit or lose by this event, whatever

happens today. She couldn't bear to come, the little girl. She's gone to school all four years to try to make up one year in high school, to get it. She is fifteen, she will be sixteen when she graduates, and I am working hard day and night. I have talked to that child, I have given many hours of sleep to raise that child. You can ask any one of those people what a fine job has come of this child. She is an above-average student, and she is taking motor pool, and her swimming she's in a choir at Sunday school, she's a well-thought-of child, and a smart child. I am teaching her to sew, cook and everything.

She is waiting with apprehension for what her brother is going through, and I know it is going to make or break this child, and I put in seven hard years, and I don't appreciate seeing it go down the drain, really I don't, because I promised

her last night, so she would get a decent night's sleep, because she sensed this was coming on. They all have a little ESP, all of us, we do. I sensed something was wrong a long time ago, and she did too. I keep her quiet, and I try to keep her nerves down, with medication or otherwise, to keep her so she will go through school, get an education. I believe in it strongly.

I promised her faithfully that we would do everything to keep him alive, and she's going on that promise. Believe me, I mean it sincerely with all my heart. What else can I say? Amen.

THE COURT: All right.

MR. WILLIAMS: Your Honor, the photographs which the defendant's mother exhibited to the Court are not in evidence, and I think we should reflect that she was making reference to severe burns that the boy sustained as a youth, as a result of

which he had extensive hospitalization. I am told his body still bears scars.

MR. GOLDSTEIN: Your Honor, do you wish a response by the State as to aggravating and mitigating circumstances?

THE COURT: Yes, I think perhaps the State is entitled to answer, and I am interested in what the State answers to the argument as to the penalty.

MR. GOLDSTEIN: As to the comments made by Mr. Tarre and Mr. Williams, regarding the aggravating and mitigating circumstances, I would basically rest on the argument I made to the jury prior to them considering the issue under which they returned a recommendation of death.

I think that under the aggravating circumstances certainly (d) is applicable, because the crime was committed in the course of a robbery.

(E) is likewise applicable because what probably or possibly motivated the defendant was to prevent a lawful arrest, in firing that last shot into Joseph Jones.

(F) is certainly applicable, contrary to what Mr. Williams said. It was committed for pecuniary gain, no question about it.

(H) applies in that the capital felony was especially heinous, atrocious and cruel.

Your Honor is familiar with the facts, and I submit that that circumstance is most prevalent as a fact in this case.

As to mitigating circumstances, we already have had discussion as to the history of criminal activity of the defendant, as to what would have been proper to present before the jury. Your Honor, I think, is well aware of that aspect.

I don't believe that the defendant did commit this felony while he was under the influence of extreme mental or emotional disturbance. Certainly his participation was the dominant rule, and I don't believe he was acting under the domination of any particular individual. I think we had competent testimony to that effect by two doctors, Dr. Sylvester and Dr. Corwin.

I also don't feel that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not at all impaired.

I would just urge the Court again, as I did urge the jury, to return their recommendation, and to sentence the defendant as per the recommendation of the jury.

MR. WILLIAMS: Your Honor, with regard to that aggravating circumstance designated (E) in the statute, we believe that the legislature contemplated, when including that aggravating circumstance, some affirmative step taken by an accused either against a law enforcement officer, or some other person lawfully attempting actively to apprehend him or keep him in custody.

The State admits that the applicability of that aggravating circumstance is a function of surmise or speculation and therefore must be disregarded by the Court because clearly it hasn't been proven beyond and to the exclusion of a reasonable doubt.

With regard to the applicability of aggravating circumstance (F), whether the offense was committed for pecuniary gain, we think it reasonable and certain

that the legislature had in mind in establishing the consideration as an aggravating circumstance, situations in which a person was killing for hire, or similar circumstances which are, in any event, not borne out by the evidence in this case. The evidence affirmatively was that nothing was taken, and that aggravating circumstance also must, for that reason, fall because it has not been proven beyond and to the exclusion of a reasonable doubt.

We can only comment again, your Honor, as Mr. Goldstein has said, you have heard not only the case facts, but the testimony of the clinicians who were appointed by the Court to examine this young man, and without attempting to condone or excuse what the jury finds that he has done, we suggest to the Court that it would be inappropriate and a waste to

revert to the concept of an eye for an eye, when the eye that the Court wants to take back is not capable of perfect vision.

THE COURT: All right. The Court has allowed everyone here to have their say, although the Court is under the impression, and the Court's opinion concerning this type of procedure is that the Court probably and really has made its decision based on what was heard in the trial, and what was heard after the trial during the part of the proceedings in which -- the second part of the bifurcated proceedings whereby the parties had their opportunities to present evidence and argument to the jury concerning the aggravating and mitigating circumstances.

The Court is very mindful of the pain that comes from such a matter, not only to the defendant and his family, but I am sure all of the attorneys and the Court.

The Court feels that only two or three years ago when the legislature saw fit to enact the present law on first degree murder and other matters, provided a procedure and certain standards to be considered by the jury and the Court, and put upon the jury and the Court the obligation to weigh those matters as impartially as possible and come to a conclusion, and the object of it was to eliminate as much as possible the individualistic characteristics and personalities of various defendants who might be in the position of the defendant, so that the jury and the Court would render an opinion and finding that was based upon standards, making no difference whether the defendant is black or white, female or male, from a ghetto or from a middle class or high class economic situation, and the jury has made its recommendation, and the

Court has very carefully considered all of the evidence bearing on the aggravating and mitigating circumstances, and the Court is required by law to enter its findings in writing, which the Court is prepared to do, and will read the final judgment, which then will be filed with the Court, with copies to the State and the defense as follows:

> "This cause came on before the Court for trial by jury, and after deliberations a verdict was rendered, finding the defendant guilty of murder in the first degree.
>
> "Thereafter the defendant was adjudicated guilty by the Court, and the jury after hearing additional matters, retired to consider an advisory sentence pursuant to Florida Statute

921.141(2). The majority returned and in open court recommended that this Court impose the death penalty upon the defendant.

"This Court, independent of, but in agreement with, the advisory sentence rendered by the jury does hereby impose the death penalty upon the defendant Lenson A. Hargrave, and in support thereof as required by Florida Statute 921.141(3), submits this, its written findings upon which the sentence of death is based.

1. That the aggravating circumstances found by the Court to be present and listed by the Court with the lettering as set forth in Florida Statute 921.141(5) are as follows:

(D) That the capital felony was committed while the defendant was engaged in the attempt to commit a robbery.

(E) That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

(F) That the capital felony was committed for pecuniary gain.

(H) That the capital felony was especially heinous, atrocious or cruel, in that, after initially shooting the victim and while the victim lay helplessly bleeding on the floor, the defendant deliberately leaned over the counter and shot the victim in the head.

2. That none of the remaining aggravating circumstances set out

by statute to be considered were proved beyond a reasonable doubt.

3. That as to mitigating circumstances, the Court finds as follows:

(a) That there is some evidence of prior criminal activity on the part of the defendant; however, there have been no prior convictions so that it must fairly be said that the defendant has no significant history of criminal activity.

(b) That the defendant was not under the influence of extreme mental or emotional disturbance when the capital felony was committed.

(c) That the victim was not a participant in the defendant's conduct nor did he consent to his acts.

(d) That the defendant was not merely an accomplice in the capital felony committed by another person and that his participation was not relatively minor.

(e) That the defendant did not act under extreme duress or under the substantial domination of another person.

(f) That although there is some evidence of a personality defect in the defendant and some possibility of an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the Court finds that such capacity was not substantially impaired.

(g) That the age of the defendant at the time of the crime, that is, a few days less than 19 years, is a mitigating circumstance; however, he was, at the time of the crime, self-supporting as an adult being employed by a security company. The Court finds that the defendant is of average intelligence or possibly slightly less than average intelligence.

4. It may be, as alleged by the defense, that there could be some doubt as to whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired to some degree. There is no doubt that the defendant has a history of some mental abnormalities which

may yet be affecting the defendant; however, it is the finding of the Court that such abnormalities only constitute a personality defect. A great number, possibly a majority of all persons who commit crimes, also ha e this or a similar type of personality defect.

5. The Court is in agreement with the jury that the aggravating circumstances in the case outweigh the mitigating circumstances. Therefore, the Court has no choice under the law but to impose the death penalty upon the defendant, Lenson A. Hargrave.

"Wherefore, it is ordered and adjudged as follows:

1. That you, Lenson A. Hargrave, be, and you are hereby sentenced to death.

2. That you are hereby remanded to the custody of the Dade County Department of Corrections to be conveyed to the State Division of Corrections for execution of this sentence according to law".

The Court has signed and grants the order declaring the defendant to be an indigent person and proceed in forma pauperis.

Has there been any discussion between the defendant and counsel as to continued representation on the appeal?

MR. WILLIAMS: Your Honor, the matter has not been resolved yet. Mr. Tarre and I have not finished discussing the matter between ourselves yet and until we do that it would be premature for us even to talk to the defendant or his family.

We will, however, prepare a motion for new trial, and we ask, in that regard,

that the Court order that the defendant be retained in the Dade County Jail until the motion for new trial can be argued.

We submit to the Court, in passing, that this will not be a form, one-page motion for new trial. We genuinely believe, as we have already done research, that there are some very substantial questions which have to be first considered by the Court, and toward that end keeping him here will also enable the Court to determine the status of his appellate representation.

Mr. Tarre has another suggestion, that it might be appropriate for the Court, at this point, to appoint the office of Phillip Hubbart to represent the defendant on appeal.

THE COURT: Ordinarily that should be done nowadays except that I would think that perhaps there is a continuing conflict with the other defendant.

Ordinarly on appeal there is not, but I don't know but what there isn't in this case.

MR. TARRE: Your Honor, perhaps we can consult with the Public Defender's office as to that point, and report back to the Court informally at the beginning of the week, and if they feel there is no conflict, we can submit a motion and order.

THE COURT: All right. Let the record reflect that the defendant's fingerprints are being taken, and he is signing the form.

MR. WILLIAMS: I don't think there is any statutory justification for compelling him to affix his signature to the card.

Will your Honor then set a report date for sometime next week so that the status of the defendant's representation can be determined at that time, and at the same time we would ask the Court to set a

date for a hearing on our motion for new trial.

THE COURT: All right, we will put it on for report a week from today. However, in considering this matter about retaining the defendant here, the Court has to always be cognizant of the fact that the jail is overcrowded, and there is not too much point in retaining the defendant here at this point. There is nothing that he can do that will affect the motion for new trial that I know of.

MR. TARRE: Let me interject that if the Public Defender undertakes the representation on appeal, which I personally would urge, it might not be such a bad idea to have him here to consult with whomever takes over the appeal. It would only be a matter of a week or so, perhaps.

THE COURT: All right. A week from today, the 25th, for report, at 9 o'clock.

MR. TARRE: One more thing -- though perhaps I missed it -- I don't think you have advised the defendant that he has a right to an appeal of the sentence.

THE COURT: Well, the reason for that is that it is automatically appealed, whether he wants it or not.

MR. TARRE: I understand that. I didn't want to overlook anything.

THE COURT: I will advise him of that.

Mr. Hargrave, you are entitled to an appeal. As a matter of fact, you are not only entitled to it, but in a case of this sort there is an automatic appeal. So your case will be appealed.

The only thing that remains in doubt about it now is who is going to handle your appeal, so you will discuss that matter with your attorneys, and next Friday morning we will go into the matter more fully.

If there is nothing further to come before the Court --

MR TARRE: Excuse me, your Honor. One small matter. Mr. Hargrave has asked me to ask the Court, if possible, if he could visit his family for a few moments. I don't know what the Court's schedule is.

THE COURT: Well, that is the responsibility of the Department of Corrections. He has been remanded to them, and we can't do that in this type of matter especially.

MR. TARRE: Can he remain here for a moment or two before he is taken back?

THE COURT: If it is all right with them. I think they have orders not to do that. You have to do that kind of thing in jail.

MR. TARRE: All right.

THE COURT: Court is adjourned.

(Thereupon the hearing was concluded.)

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. 87-1460

RICHARD L. DUGGER,
Secretary, Florida Department
of Corrections and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida,

Petitioners,

vs.

LENSON HARGRAVE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. 87-2460

RICHARD L. DUGGER,
Secretary, Florida Department
of Corrections and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida,

Petitioners,

vs.

LENSON HARGRAVE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

The respondent, Lenson Hargrave, files this brief in opposition to the petition for writ of certiorari filed by petitioners Richard L. Dugger and Robert A. Butterworth in this cause.

STATEMENT OF THE CASE

Respondent's statement of the case will be limited to a recitation of pertinent factual aspects of the proceedings which are omitted from the statement of the case in the petition.[1]

At the outset of the jury-sentencing hearing on July 15, 1975, the trial judge instructed the jury as follows:

> During the hearing, you will receive evidence and testimony concerning certain aggravating or mitigating circumstances.
> Following this presentation . . . you will retire to consider rendering to this Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, whether sufficient mitigating circumstances exist or outweigh any aggravating circumstances found to exist. . . .

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[1] The symbol "PA" will designate petitioners' appendix and the symbol "RA" will designate respondent's appendix.

(PA 119-20).[2] The court then listed the aggravating circumstances set forth in Section 921.141(5), Florida Statutes (1985), introducing the roster by stating to the jury that "aggravating circumstances shall be limited to the following . . . ." (PA 120). The roster of mitigating circumstances in Section 921.141(6), Florida Statutes (1975), was introduced as follows: "The mitigating circumstances which you may consider, if established by the evidence, are as follows . . . ." (PA 122).

The prosecution's lead witness, Dr. Robert Sylvester, testified to respondent's "dull-normal to normal" intelligence level,[3] "impairment" due to drug usage, possible brain damage, and "personality problems . . . of a major dimension" (PA 132-37). The prosecutor elicited from the doctor testimony that respondent did not suffer from any psychotic disorders and that respondent had not been dominated by the codefendant Karge during the incident (PA 138, 142).[4]

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2 During jury-selection proceedings, the court had explained the Florida capital-sentencing structure as follows:

> The law sets forth certain factors which the jury must take into consideration, and at that stage of the proceedings, the court supplies the jury orally and in writing with what are called aggravating circumstances which are listed in the law and mitigating circumstances, certain other circumstances that are listed in the law. . . . The judge then makes a decision as to these mitigating circumstances and aggravating circumstances with the help of the recommendation of the jury and the judge makes the final decision on the death penalty or life imprisonment.
>
> * * *
>
> . . . The decision of the jury as to life or death is not just an arbitrary one, but you are supposed to consider certain factors, and reach a recommendation based on what you find those factors to be.

(RA 3-4).

3 Respondent, who had been 18 years of age at the time of the offense and was 19 years old at the time of trial, was described by the witness as having a mental age of 16 to 17 years (PA 131-32).

4 The prosecution also introduced the testimony of two lay witnesses: Joy Simn, the fiancee of the codefendant Karge, and Janice Fraker, the girlfriend of Terry Morton, an informant who (Cont'd)

Dr. William Corwin, a psychiatrist, testified on behalf of respondent (PA 208-09). Counsel elicited from Dr. Corwin that respondent suffered from a "personality disorder" of "lifelong duration," which disorder was typified by drug usage and impulsivity (PA 211-14). Counsel then elicited that respondent "felt that people took advantage of him." (PA 215). This questioning laid the groundwork for counsel's ultimate question of the witness, with which he brought forth the doctor's opinion that respondent "could be dominated" by other people (PA 216-17). Counsel next called respondent's mother, who testified that she had been aware of respondent's close relationship with the codefendant Karge, and that Karge had been "a magnet," drawing respondent away from her (PA 218-20).

In his closing argument, the prosecutor told the jury, after reviewing the list of aggravating circumstances (PA 229-34), that "[y]ou're going to be instructed as to certain mitigating circumstances that you should look for, and if present, apply and weigh . . . ." (PA 234). He then listed the mitigating circumstances specified in Section 921.141(6), Florida Statutes (1975) (PA 234-40). Counsel for respondent, in his closing argument, characterized respondent as a "defective child," referred to the Greek city-state of Sparta, and depicted the jury's responsibility as being to determine whether "it's time to return to Spartan tactics and put this kid on an electrically charged plain and leave him there to die." (PA 241-43). He argued to the jury respondent's "dull-normal intelligence," the emotional problems which "render[ed] him unable to deal normally with society," as testified to by Dr. Sylvester, and that respondent's "condition is such as to render him . . . susceptible to being dominated" by the codefendant (PA 243-45). Based upon the testimony of Dr.

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had provided information to the police regarding the offense in this case (PA 193-207). These witnesses testified that respondent, prior to his arrest, had admitted his responsibility for the homicide, and had stated that "it wouldn't bother him to kill again" and that "he would do it again if anyone was to be in his way." (PA 196, 202). Objections to this testimony were overruled on the ground that it was being introduced only to rebut the statutory mitigating circumstance that respondent had "acted under the substantial domination of another person," see § 921.141(6)(e), Fla.Stat. (1975), the codefendant Karge (PA 189-92).

Corwin and respondent's mother, counsel further argued that respondent had in fact been under the domination of the codefendant at the time of the homicide (PA 245-49). Counsel also argued that respondent could be treated for his problems if given a life sentence, and that the balancing of aggravating and mitigating circumstances did not support imposition of the death penalty (PA 250-52).

The trial judge instructed the jury that its advisory verdict should "be based upon the facts as you find them from the evidence and the law as given you by the Court in the charges preceding and following the sentencing hearing." (PA 253-54). The court did not reinstruct the jury on the aggravating and mitigating circumstances, but stated that the verdict was to be based upon a weighing of the previously-enumerated circumstances (PA 254). The jury subsequently returned a verdict recommending imposition of a death sentence (PA 256-57).

At the conclusion of the jury proceedings, counsel requested the court to order a presentence investigation (PA 263). The court deferred ruling on the request, but noted its opinion that "there is very little, if any of the ordinary presentence report that would be relevant to what the jury and the Court are supposed to consider in this matter concerning mitigating and aggravating circumstances." (PA 265-66). The motion was renewed at the final sentencing hearing on July 18, 1975, and respondent's counsel, in arguing that that a presentence investigation should be ordered and/or a life sentence imposed, stated that "while the legislature has promulgated a list of six mitigating circumstances, the list of aggravating circumstances numbers seven, which gives rise to the appearance . . . that the criteria for determining the imposition of capital punishment are weighted against the defendant." (PA 274). In opposition, the prosecutor argued that the court was "bound by the criteria outlined in the statute as to the aggravating and mitigating circumstances," and that a presentence investigation "would not serve any purpose, because I don't believe the Court can go outside of those criteria." (PA 275). Respondent's counsel did not take issue with

the prosecutor's characterization of the permissible mitigating circumstances, asserting in response that such an investigation might uncover statutory mitigating circumstances (PA 276). The court denied the motion, ruling that both it and the jury could only consider "certain factors" in imposing sentence, and that a presentence report would be irrelevant to those factors (PA 276-77).[5]

The court prefaced its announcement of the death sentence by stating its belief that the Florida statute had established "certain standards to be considered by the jury and the Court," and that "the object of it was to eliminate as much as possible the individualistic characteristics and personalities of the various defendants . . . so that the jury and the Court would render an opinion and finding that was based upon standards." (PA 298). The sentencing order entered by the court states that, "as required by Florida Statute 921.141(3)," the court was submitting "its written findings upon which the sentence of death is based." (RA 5).[6]

The court's order, in analyzing mitigating circumstances,

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5 Counsel then asked the court if it would permit members of respondent's family to "address brief comments to the Court before sentence is passed" (PA 278-29), advising the court that respondent was emotionally incapable of exercising his right to allocution (PA 281). The court responded, "Yes, the Court understands," and inquired whether "anyone else care[d] to make a statement" (PA 281). Counsel then asked members of respondent's family if they wished to speak, stating, "I haven't spoken to them, your Honor." (PA 281). Respondent's mother stated to the court that respondent had suffered a concussion several years earlier, that his doctor had not believed that he required psychiatric care as a result although she had thought it necessary, that respondent had been severely burned on one occasion, that he had had a "roof over his head and food in his stomach" during his youth, and that she and her husband had "tried so hard" to provide respondent with a good upbringing (PA 282-86). Respondent's grandmother told the court that she agreed with his mother that "the accident was the beginning of the whole thing," that respondent was "worth rehabilitating, because he's a smart boy," that his younger sister had been "in a bad way" and was living with her, and that she had promised the sister "that we would do everything to keep him alive." (PA 287-91). After hearing this testimony, the court stated that it had "allowed everyone here to have their say," but that it "probably and really [had] made its decision on what was heard in the trial." (PA 297).

6 The cited statute, § 921.141(3), Fla.Stat. (1975), restricted the court to weighing the mitigating factors "as enumerated" in the statutory mitigating roster.

discussed only the statutory mitigating circumstances, two of which -- respondent's age of 18 years and his lack of prior criminal history, § 921.141(6)(a), (g), Fla. Stat. (1975) -- were found by the court (RA 6). The court rejected the evidence of respondent's mental impairment on the ground that it failed to satisfy the statutory standard of a "substantially impaired" capacity, § 921.141(6)(f), Fla.Stat. (1975), as follows:

> (f) . . . [A]lthough there is some evidence of a personality defect in the defendant and some possibility of an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the Court finds that such capacity was not substantially impaired.

(RA 6).[7] The state supreme court, in upholding this rejection of mitigation, concluded that the trial judge "did not ignore or fail to consider the psychological evidence bearing on mitigation," but "[o]bviously" had not been "persuaded that it provided a sound basis for establishment of the statutory mitigating circumstances." (RA 15).

Respondent's petition for writ of habeas corpus alleged, in pertinent part, that his death sentence violated the rule of *Lockett v. Ohio*, 438 U.S. 586 (1978), in that he had been denied consideration of nonstatutory mitigation by the restrictive jury instructions and the limited consideration of mitigation by the trial judge (RA 87-88).[8] The en banc Court of Appeals ruled that

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7 The court further found that, while "[t]here is no doubt that the defendant has a history of mental abnormalities which may yet be affecting [him]," such was not of mitigating weight because the "abnormalities only constitute a personality defect," and "a great number, possibly a majority of all persons who commit crimes, also have this or a similar type of personality defect." (RA 7).

8 The Court of Appeals found that these aspects of respondent's claim for relief were not raised in the Supreme Court of Florida prior to that court's affirmance of the death sentence on direct appeal. *Hargrave v. Dugger*, 832 F.2d 1528, 1529-30 (11th Cir. 1987)(en banc). The state supreme court affirmed the sentence on June 30, 1978, three days before the *Lockett* decision was issued by this Court. *Hargrave v. State*, 366 So.2d 1 (Fla. 1978), *cert. denied*, 444 U.S. 919 (1979). Respondent did raise these issues in his post-*Lockett* petition for rehearing in the state court (RA 21-26), which petition the state moved to strike on the ground that it violated Florida procedural rules prohibiting the inclusion of new grounds for review in a rehearing petition (RA 42-45). The petition was denied on February 6, 1979; the court's order states that the motion to strike was rendered moot by the (Cont'd)

"[t]he totality of the circumstances reflect that as in *Hitchcock* [*v. Dugger*, ___ U.S. ___, 107 S.Ct. 1821 (1987)], Hargrave's sentencing proceedings did not comport" with the rule of *Lockett v. Ohio*, and that the writ should issue unless the state either affords respondent a new sentencing hearing or imposes a lesser sentence. *Hargrave v. Dugger*, 832 F.2d 1528, 1535 (11th Cir. 1987)(en banc).

In reaching this result, the court first addressed the question whether respondent could establish cause for any state procedural defaults on his claim. *Id.* at 1530-31.[9] The court con-

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denial of the petition (RA 46).

Respondent relitigated his *Lockett* claims in a motion for post-conviction relief filed in the state trial court on September 19, 1980 (RA 53-58). The state court ruled that the claims raised in the motion "were actually litigated on direct appeal or are otherwise inappropriate for a motion to vacate." (RA 76-77). The state supreme court affirmed that ruling on April 2, 1981, holding as follows:

> The [Fla.R.Crim.P.] 3.850 motion asserts a multitude of grounds for relief, from constitutional and non-constitutional error in the guilt phase of the trial to alleged fundamental defects in the sentencing process. The trial court found, and we so hold, that the issues raised by appellant either were or could have been raised on direct appeal, or they involve changes in decisional law not cognizable in a 3.850 motion.

(PA 78-79). *Hargrave v. State*, 396 So.2d 1127, 1128 (Fla. 1981) (citations and footnote omitted).

Respondent thereafter filed a habeas corpus petition on May 6, 1981, in which this claim was raised (RA 86). The district court dismissed the petition, without prejudice, on June 19, 1981, for further exhaustion of state remedies on another of respondent's claims, due to an intervening decision of this Court on that issue (RA 81-82). Exhaustion of state remedies on that claim was completed on March 24, 1983, upon the rendition of the state supreme court's decision affirming the denial of respondent's second post-conviction motion, *Hargrave v. State*, 427 So.2d 713 (Fla. 1983), and the present petition was filed in the district court on that date (RA 83-93).

9

The panel opinion in the Court of Appeals had held that the state supreme court had not considered the merits of respondent's claim, see n.8, *supra*, and that respondent had failed to demonstrate cause for his default. *Hargrave v. Wainwright*, 804 F.2d 1182, 1187-90 (11th Cir. 1986), *vacated and en banc rehearing granted*, 809 F.2d 1486 (11th Cir.), *on rehearing*, 832 F.2d 1528 (11th Cir. 1987)(en banc). The en banc opinion states that, "[w]hile a majority, but not all of the judges of this Court might have been inclined to accept the panel's analysis" of the question whether the state court had reached the merits of the claim, recent precedent from the Supreme Court of Florida "raises a serious doubt as to whether it would now hold there to be a procedural default under the circumstances of this case," leaving open "the question of the position of the federal court in a case (Cont'd)

cluded that *Lockett v. Ohio* was "the articulation of a constitutional principle that had not been previously recognized," that, "at the time of Hargrave's trial and appeal, there were no federal decisions which should have alerted Hargrave's attorney to the possibility of a challenge based on exclusion of non-statutory mitigating circumstances,"[10] and that Florida law, as it existed at that time, "could be construed to be directly contrary" to the subsequently-announced rule of *Lockett*. *Id.* at 1530-33.[11] Based

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where the Florida courts had enforced a procedural default, but under later law would not." *Hargrave v. Dugger*, 832 F.2d at 1530 (citation omitted). However, the court stated that this question would not be addressed "because, unlike the panel, we hold that Hargrave has shown cause for default and actual prejudice sufficient to require a federal review of his constitutional claim on the merits." *Ibid.*

The only member of the court below who did not join in Chief Judge Roney's opinion for the en banc court was Judge Tjoflat, the author of the panel opinion. In a special concurring opinion, Judge Tjoflat stated that cause-and-prejudice analysis was unnecessary to permit review of the merits of respondent's claims because subsequent state-law precedent made it clear that the Florida courts no longer enforced a procedural-default rule on such claims. *Id.* at 1535-39 (Tjoflat, J., specially concurring).

10 In analyzing then-extant federal law, the court looked first to *Proffitt v. Florida*, 428 U.S. 242 (1976), which had issued during the pendency of respondent's direct appeal. *Hargrave v. Dugger*, 832 F.2d at 1531. The court noted that this Court in *Proffitt*, while "squarely" holding that the Florida courts could not consider nonstatutory aggravating circumstances, "did not suggest that a limitation on *mitigating* circumstances might be unconstitutional," characterized Florida law as being that "the decision to impose the death penalty 'turned upon whether certain statutory aggravating circumstances surrounding the crime outweighed any statutory mitigating circumstances found to exist,'" stated that Florida trial judges were "'directed to weigh the statutory aggravating and mitigating circumstances'" in determining the sentence to be imposed, and "described the trial court's function as that of weighing 'eight aggravating factors against seven mitigating factors.'" *Id.* at 1531 (citing *Proffitt v. Florida*, 428 U.S. at 246, 250, 251)(emphasis by the court). Based upon these statements, the court found that "*Proffitt* contains no direct statement or inference that, as a matter of federal constitutional law, the statutory list of mitigating circumstances should be considered nonexclusive." *Ibid.*

The en banc court also looked to the companion cases decided contemporaneously with *Proffitt*, and found them to "shed no light on this issue." *Ibid* (citation omitted). Finally, the court found that "there is a dearth of federal cases decided prior to or during Hargrave's trial and appeal which address Florida's post-*Furman* [*v. Georgia*, 408 U.S. 238 (1972)] capital statute." *Hargrave v. Dugger*, 832 F.2d at 1531.

11 In examining Florida law, the court looked first to *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974); it concluded that the state court, in that case, "did not explicitly state that the statutory list was exclusive but it treated the statutory mitigating circumstances as if they were the only factors which could be considered," and that the Florida (Cont'd)

upon these findings, the court held that "a successful claim based on exclusion of non-statutory mitigating circumstances was unavailable under federal and Florida law preceding *Lockett*,"[12] and that, "[s]ince Hargrave 'lacked the tools to construct [his] constitutional claim,' *Engle* [*v. Isaac*, 456 U.S. 107, 133 (1982)], his failure to object to the judge's consideration only of statutory mitigating circumstances at the sentencing hearing and on appeal to the Florida Supreme Court must be excused" under the rule of *Reed v. Ross*, 468 U.S. 1 (1984). *Hargrave v. Dugger*, 832 F.2d at 1531, 1533.

In concluding that respondent had demonstrated actual prejudice, the court ruled as follows:

> We also hold that Hargrave would suffer actual prejudice if his *Lockett* claim were found to be procedurally barred. The State argues that Hargrave cannot establish preju-

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court, in subsequent decisions, had "continued to treat the statutory list as exclusive without explicitly so holding." *Hargrave v. Dugger*, 832 F.2d at 1532 (citations omitted). The court then discussed *Cooper v. State*, 336 So.2d 1133 (Fla. 1976), *cert. denied*, 431 U.S. 925 (1977), decided during the pendency of respondent's appeal, and found that the state court had therein "stated that the only factors relevant to sentencing under the Florida statute were the statutory aggravating and mitigating circumstances." *Hargrave v. Dugger*, 832 F.2d at 1532. While noting that the Florida court, post-*Lockett*, had ruled that "the introduction of nonstatutory mitigating evidence had never been precluded in Florida," *ibid* (citing *Songer v. State*, 365 So.2d 696, 700 (Fla. 1978)(on rehearing), *cert. denied*, 441 U.S. 956 (1979)), the court below recognized the state court's acknowledgement that "its law could have been misconstrued," and concluded that, "[a]t the time Hargrave filed his appellate brief in state court, *Cooper* was prevailing precedent." *Id.* at 1532-33.

12 The court noted that this conclusion was in harmony with its own precedent:

> In light of these developments in the law, both state and federal, this Court has previously recognized the practical unavailability of a *Lockett* claim at the very time at issue in this case. This Court has described *Lockett* as a "direct reversal" of Florida mitigating circumstances law, and expressly held, with regard to a 1975 trial:
>
> > [The] trial occurred in 1975, one year before *Cooper* and three years before *Lockett*. It would be difficult to characterize the *Lockett* claim as "available" during petitioner's trial . . . .

Id. at 1532-33 (citing *Sullivan v. Wainwright*, 695 F.2d 1306, 1311 (11th Cir.), *cert. denied*, 464 U.S. 922 (1983), *Ford v. Strickland*, 696 F.2d 804, 182 (11th Cir.)(en banc), *cert. denied*, 464 U.S. 865 (1983), and *Foster v. Strickland*, 707 F.2d 1339, 1347 (11th Cir. 1983), *cert. denied*, 466 U.S. 993 (1984)).

> dice because claims such as his have been rejected many times by this Court . . . .[13]
>
> Since these decisions were rendered, however, the United States Supreme Court handed down its decision in *Hitchcock v. Dugger*, [citation omitted]. In this case, the Supreme Court overturned a death sentence imposed on a Florida defendant based on a *Lockett* claim similar to Hargrave's. *Hitchcock* has breathed new vitality into claims based on the exclusion of non-statutory mitigating factors, and Hargrave would be prejudiced if he were not now allowed to raise such a claim.

Id. at 1533 (citations omitted).

On the merits of respondent's claims, the court held that, "[l]ooking at the record in the instant case, it is clear that this case is so similar to *Hitchcock* that the cases must reach the same result." *Ibid.* The court first found that "evidence in mitigation which did not fit within the confines" of the statutory roster was introduced, *i.e.*, "[respondent's] steady employment, below-average intelligence, and history of drug abuse," and that the two mental-health experts who testified at the hearing, "while differing as to whether petitioner's mental condition satisfied the statutory mitigating circumstances, did agree that [respondent] suffered from a significant degree of mental and emotional impairment." *Id.* at 1534. The court next found that the jury instructions in the present case were similar to those in *Hitchcock*, and further, that "[t]here is other evidence in this case that the jury and sentencing judge limited their consideration of mitigating circumstances to those enumerated in the statute," citing to counsel's colloquy with the court regarding the presentence investigation, the court's statements prior to reading its sentencing order, and the court's refusal to consider mental-impairment evidence which did not satisfy the statutory standard. *Id.* at 1534-35. Based upon these considerations, the court below concluded that respondent's "sentencing proceedings did not comport" with the principles established in *Lockett v. Ohio*. *Id.* at 1535.

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[13] Petitioners' argument on prejudice was that "[t]he identical argument presented herein was made and rejected" by the Eleventh Circuit in a line of pre-*Hitchcock* decisions (RA 136-40).

REASONS FOR NOT GRANTING THE WRIT

THE ELEVENTH CIRCUIT'S APPLICATION OF THIS COURT'S PROCEDURAL-DEFAULT PRECEDENT TO HOLD THAT A CLAIM BASED UPON *LOCKETT V. OHIO*, 438 U.S. 586 (1978), WAS NOT REASONABLY AVAILABLE IN 1975 IN FINDING CAUSE FOR ANY STATE PROCEDURAL DEFAULTS, AND THAT COURT'S CONCLUSION THAT RESPONDENT HAD ESTABLISHED ACTUAL PREJUDICE, ARE NOT IN CONFLICT WITH THIS COURT'S DECISIONS REQUIRING CAUSE AND ACTUAL PREJUDICE FOR FEDERAL HABEAS REVIEW OF PROCEDURALLY-DEFAULTED CONSTITUTIONAL CLAIMS.

Petitioners' central thesis is that the Eleventh Circuit held in this case that *Hitchcock v. Dugger*, ___ U.S. ___, 107 S.Ct. 1821 (1987), constitutes "new law" under *Reed v. Ross*, 468 U.S. 1 (1984). Petition for Writ of Certiorari (hereinafter "Petition") at 12-19. This is plainly not so: what the court held is that a claim based upon this Court's 1978 decision in *Lockett v. Ohio*, 438 U.S. 586 (1978), "was unavailable under federal and Florida law preceding *Lockett*," and that, since respondent, at the time of his 1975 trial, "'lacked the tools to construct [his] constitutional claim,' his failure to object to the judge's consideration only of statutory mitigating circumstances . . . must be excused" under *Ross*. *Hargrave v. Dugger*, 832 F.2d 1528, 1531, 1533 (11th Cir. 1987)(en banc)(citation omitted).[14] Thus, peti-

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14 In addressing cause, the court below bypassed the question whether an actionable default should have been found in the first instance. *Hargrave v. Dugger*, 832 F.2d at 1530. The court noted that the Florida Supreme Court had recently held that a capital defendant who was sentenced to death in a pre-*Lockett* trial "was not procedurally barred from presenting his *Lockett* claim in state habeas corpus proceedings where the issue had not been previously litigated on direct appeal or in the petitioner's first post-conviction challenge to the sentence," *ibid* (citing *Riley v. Wainwright*, 517 So.2d 656 (Fla. 1987)), and that this ruling "raises the question of the position of the federal court in a case where the Florida courts had enforced a procedural default, but under later law would not." *Ibid*. However, the court found it unnecessary to reach this question in light of its conclusion that respondent had demonstrated cause for any default and actual prejudice. *Hargrave v. Dugger*, 832 F.2d at 1530.

In the *Riley* case, the Supreme Court of Florida held that this Court's decision in *Hitchcock* had overruled state law on mitigating-circumstance error, and that the petitioner in that case, who had first raised a *Lockett* claim in a habeas corpus petition after unsuccessful direct appellate and post-conviction litigation, was not procedurally barred from presenting the claim. 517 So.2d at 659-60. Shortly after the issuance of that decision, the state court more explicitly ruled that *Hitchcock* constitutes a "change of law" cognizable in Florida post-conviction proceedings under the rule of *Witt v. State*, 387 So.2d 922 (Fla.), *cert. denied*, 449 U.S. 1067 (1980), as follows:

(Cont'd)

tioners' argument that "*Hitchcock* did not create new law as envisioned in *Reed v. Ross*," Petition at 19, attacks a proposition never advanced by respondent or passed upon by the Eleventh Circuit.

To the extent that petitioners' argument can be construed as a challenge to the court's holding that *Lockett* claims were "unavailable," within the meaning of *Reed v. Ross*, at the time of respondent's trial and appeal, no basis is set forth for review of the decision below. Petitioners assert that mitigating-circumstance claims "rest[ed] in the percolating waters of evolving legal theory," and were "[susceptible] to challenge" at the time of respondent's trial, Petition at 19-20, while utterly ignoring the examination of controlling state and federal law set forth by the court below.

As the court noted, the appropriate point of departure, in

> We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its *Hitchcock* opinion represents a sufficient change in the law that potentially affects a class of petitioners . . . to defeat the claim of a procedural default.

Thompson v. Dugger, 515 So.2d 173, 175 (Fla. 1987). The Florida court has consistently adhered to this holding. *Ford v. State*, Nos. 70,467 & 70,793 (Fla. Feb. 18, 1988); *Combs v. State*, No. 68,477 (Fla. Feb. 18, 1988); *Waterhouse v. State*, Nos. 69,557 & 70,459 (Fla. Feb. 11, 1988); *Mikenas v. Dugger*, No. 71,129 (Fla. Jan. 21, 1988); *Booker v. Dugger*, No. 70,928 (Fla. Jan. 14, 1988); *Foster v. State*, 518 So.2d 901 (Fla. 1987); *Demps v. Dugger*, 514 So.2d 1092 (Fla. 1987); *Downs v. Dugger*, 514 So.2d 1069 (Fla. 1987); *Delap v. Dugger*, 513 So.2d 659 (Fla. 1987).

Thus, it is the Supreme Court of Florida, and *not* the Eleventh Circuit, that has construed *Hitchcock* as undoing previously-existing procedural bars. It is, of course, for the state courts to determine the proper scope of their procedural bars, *e.g.*, *County Court of Ulster County v. Allen*, 442 U.S. 140, 154 (1979), and the Florida court was free to interpret its state-law ruling in *Witt v. State* as permitting *Hitchcock*-type challenges to be raised without regard to prior defaults. However, as is suggested by the concurring opinion of Judge Tjoflat in the present case, "since the Florida courts have affirmatively indicated that they will not apply procedural default to *Lockett* claims," the federal courts "show no disrespect" by doing the same. *Hargrave v. Dugger*, 832 F.2d at 1539 (Tjoflat, J., specially concurring). Following this lead, the Eleventh Circuit has recently addressed the question left open in this case, and has squarely held that the absence of a state procedural bar to consideration of *Lockett* claims eliminates a federal court's obligation to enforce any such asserted bar. *Messer v. Florida*, 834 F.2d 890, 892-93 (11th Cir. 1987); *Armstrong v. Dugger*, 833 F.2d 1430, 1435-36 (11th Cir. 1987).

terms of an analysis of federal constitutional law,[15] is *Proffitt v. Florida*, 428 U.S. 242 (1976), which was decided during the pendency of respondent's appeal. *Hargrave v. Dugger*, 832 F.2d at 1531. The court discussed *Proffitt* as follows:

> In *Proffitt*, the Supreme Court upheld Florida's death penalty statute and, in so doing, the Court squarely held that a sentencer could not consider non-statutory *aggravating* circumstances. *Proffitt*, however, did not suggest that a limitation on *mitigating* circumstances might be unconstitutional.
>
> Indeed, in *Proffitt*, the Court stated that the decision whether to impose the death penalty "turned upon whether certain statutory aggravating circumstances surrounding the crime outweighed any statutory mitigating circumstances found to exist." Later, the Court stated that the "trial judge is . . . directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed." Also, the Court described the trial court's function as that of weighing "eight aggravating factors against seven mitigating factors."
>
> In short, *Proffitt* contains no direct statement or inference that, as a matter of federal constitutional law, the statutory list should be considered nonexclusive. . . .

Id. at 1531 (citations omitted; emphasis by the court).[16]

Of the cases that this Court decided with *Proffitt*, only *Woodson v. North Carolina*, 428 U.S. 280 (1976), provided even the vaguest support for a challenge to limited consideration of miti-

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15 At the time of respondent's trial and appeal there were, as found by the court below, no federal court of appeals cases addressing Florida's capital-punishment statute. *Hargrave v. Dugger*, 832 F.2d at 1531.

16 In *Lockett*, it is conceded that "[t]he signals from this Court have not . . . always been easy to decipher." *Id.* at 602. Discussing its approval of the Florida statute in *Proffitt*, the Court noted that "six Members of this Court assumed . . . that the range of mitigating factors listed in the statute was not exclusive." *Id.* at 606 (footnote omitted)(citing *Proffitt v. Florida*, 428 U.S. at 250 n.8). *But see id.* at 629-30 (Rehnquist, J., dissenting)(plurality in *Proffitt*, in analyzing Florida's sentencing structure, had believed that the sentencer would weigh statutory aggravating and mitigating factors in imposing sentence); *Jurek v. Texas*, 428 U.S. 262, 271-72 (1976)(*Proffitt* held constitutional "a system that directs the judge and advisory jury to consider *certain enumerated mitigating circumstances*")(emphasis supplied). In any event, *Proffitt* did *not* hold that mitigating circumstances were *required* to be unlimited, and any assumption in which the Court may have engaged was proven wrong only a few days after *Proffitt* issued, when the state supreme court decided *Cooper v. State*, 336 So.2d 1133 (Fla. 1976), *cert. denied*, 431 U.S. 925 (1977). See pp.15-17, *infra*.

gation.[17] However, while *Woodson* established that a death-penalty statute cannot be mandatory and must allow for consideration of "relevant facets" in mitigation, 428 U.S. at 303-04, the Court "did not attempt to indicate . . . which facets of an offender or his offense it deemed 'relevant' in capital sentencing or what degree of consideration of 'relevant facets' it would require." *Lockett v. Ohio,* 438 U.S. at 604 (citation omitted). "[T]hose questions" were answered, for the first time, by the decision in *Lockett, id.* at 604-05, and the Eleventh Circuit properly concluded that *Woodson* "shed no light on this issue." *Hargrave v. Dugger,* 832 F.2d at 1531.[18]

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17 *Woodson* was decided one year after respondent's trial. If, as petitioners contended in the Court of Appeals (RA 114), the critical procedural default in this case was the failure of respondent's counsel to raise a *Lockett* claim at trial, in that this default absolutely barred *any* review on direct appeal, *Woodson* provides no support whatsoever for the proposition that respondent's claim was reasonably available.

18 Petitioners' suggestion that *Woodson* established a reasonable basis for a *Lockett* challenge prior to 1978, Petition at 19 & n.4, is thus refuted by *Lockett* itself. The other decisions upon which petitioners rely for the proposition that such challenges were available to respondent, *Pennsylvania ex rel. Sullivan v. Ashe,* 302 U.S. 51 (1937), and *McGautha v. California,* 402 U.S. 183 (1971), Petition at 19 & n.4, although cited by this Court in *Lockett,* 438 U.S. at 598, 602-03, did not support in any manner an Eighth Amendment attack on limited mitigation in capital sentencing proceedings.

In *Ashe,* this Court rejected an equal-protection challenge to a state escape statute pursuant to which the permissible sentence was the term that the prisoner was serving at the time of the escape. 302 U.S. at 53-55. In discussing the wide latitude afforded the states in sentencing matters, the Court noted that, "[s]ave as limited by constitutional provisions safeguarding individual rights, a State may choose means to protect itself and its people against criminal violation of its laws," *id.* at 55. The Court continued, in the portion of the decision upon which petitioners rely, to state that "[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Id.* at 55 (citations omitted). Nothing in this statement even suggested that Eighth Amendment strictures required such consideration; indeed, as is specifically stated in *Lockett* -- in citing to *Ashe* -- "individualized sentencing" in criminal cases had not previously been recognized as "constitutionally required." *Lockett v. Ohio,* 438 U.S. at 602. *McGautha v. California* only reinforces this point. There, this Court rejected claims that due process required the states to adopt standards for capital sentencing and to provide for bifurcated trials, 402 U.S. at 200-22, and specifically *declined* to determine "whether or to what extent the concept of due process of law requires that a criminal defendant wishing to present evidence or argument presumably relevant to the issues involved in sentencing should be permitted to do so." (Cont'd)

The court then proceeded to examine state law, prior to the advent of *Lockett*, with particular attention to the decisions of the Supreme Court of Florida in *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974), and *Cooper v. State*, 336 So.2d 1133 (Fla. 1976), *cert. denied*, 431 U.S. 925 (1977).[19]

Id. at 218-19.

To be sure, the language in *Ashe* is consistent with the constitutional rule announced in *Lockett*. But even if that language, or words used by this Court in any of the decisions relied upon by petitioners, could be construed as providing a modicum of support for a *Lockett* challenge prior to 1978, such would not defeat the holding of the court below; *Reed v. Ross* simply does not require a blank slate for a finding of cause. Rather, there must have been "a reasonable basis upon which [respondent] could have *realistically* appealed his [sentence]," *id.* at 19 (emphasis supplied), and the decisions upon which petitioners rely do nothing to defeat the holding of the court of appeals. *Id.* at 18-19 (burden-of-proof claim not reasonably available in pre-*In re Winship*, 397 U.S. 358 (1970), trial, although decisions of one federal court and one state court provided "indirect support" for claim).

19
The then-governing statute, Section 921.141, Florida Statutes (1975), provided in pertinent part as follows:

> (2) ADVISORY SENTENCE BY THE JURY. - After hearing all the evidence, the jury shall deliberate and return an advisory sentence to the court, based upon the following matters:
> (a) Whether sufficient aggravating circumstances exist *as enumerated* in subsection [5];
> (b) Whether sufficient mitigating circumstances exist *as enumerated* in subsection [6], which outweigh the aggravating circumstances found to exist; and
> (c) *Based on these considerations*, whether the defendant should be sentenced to life [imprisonment] or death.
> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. - Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
> (a) That sufficient aggravating circumstances exist *as enumerated* in subsection [5], and
> (b) That there are insufficient mitigating circumstances, *as enumerated* in subsection [6], to outweigh the aggravating circumstances.
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact *based upon the circumstances in subsections* [5] *and* [6] and upon the records of the trial and sentencing proceedings. . . .

§ 921.141(2)(3), Fla.Stat. (1975)(emphasis supplied).

(Cont'd)

The court found as follows:

> Nor should Hargrave's attorney have been alerted to the possibility of a *Lockett* claim by decisions from the Florida courts. In *State v. Dixon*, [citation omitted] the Florida Supreme Court did not explicitly state that the statutory list was exclusive but it treated the statutory mitigating circumstances as if they were the only factors which could be considered. After *Dixon*, the Florida courts continued to treat the statutory list of mitigating factors as exclusive without explicitly so holding.[20]
>
> Finally, in *Cooper v. State*, [citation omitted], decided during the pendency of Hargrave's appeal, the Supreme Court of Florida seemed to make explicit the exclusivity of the statutory mitigating factors . . . . The Supreme Court of Florida stated that the only factors relevant to sentencing were the statutory aggravating and mitigating circumstances . . . .

Hargrave v. Dugger, 832 F.2d at 1532 (citations omitted). The court did note that the Supreme Court of Florida had ruled, post-*Lockett* (and after it had upheld respondent's sentence), that "the introduction of nonstatutory mitigating evidence had never been precluded in Florida," *ibid* (citing *Songer v. State*, 365 So.2d 696, 700 (Fla. 1978)(on rehearing), *cert. denied*, 441 U.S.

Section 921.141(2)(b) and (3)(b) were amended after *Lockett* to delete the restriction that mitigating circumstances be limited to those "enumerated" in the statute. Ch. 79-353, Laws of Fla. (1979). This Court has acknowledged the post-*Lockett* revisions of the Florida death-penalty statute, and specifically, these changes from provisions directing "the sentencer to determine whether statutory aggravating circumstances are outweighed by statutory mitigating circumstances" to the current provisions directing "the sentencer to determine whether statutory aggravating circumstances are outweighed by any mitigating circumstances." *Spaziano v. Florida*, 468 U.S. 447, 451 n.4 (1984); *see Hitchcock v. Dugger*, 107 S.Ct. at 1823 (noting that Florida legislature, post-*Lockett*, "removed the phrase 'as enumerated [in the statutory list]" from the provisions requiring the advisory jury and the sentencing judge to consider mitigating circumstances")(citation omitted). *See also Barclay v. Florida*, 463 U.S. 939, 961 n.2 (1983)(Stevens, J., concurring).

20 In three post-*Dixon* decisions that predated respondent's trial, the Florida court strongly endorsed limited consideration of mitigating circumstances. *Alford v. State*, 307 So.2d 433, 444 (Fla. 1975)("the most important safeguard provided by [the statute] is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed"), *cert. denied*, 428 U.S. 912 (1976); *Hallman v. State*, 305 So.2d 180, 181 (Fla. 1974)(death sentence upheld where trial judge entered findings "specifically delineating the aggravating and mitigating circumstances pursuant to the safeguards afforded by Section 921.141"), *cert. denied*, 428 U.S. 911 (1976); *Taylor v. State*, 294 So.2d 648, 651 (Fla. 1974)(death sentence reversed where record indicated judge may not have considered "mitigating circumstances enumerated by the statute and found in the record").

956 (1979), but that the state court "has acknowledged that its law could have been misconstrued." *Ibid.*[21]

Based upon this examination of the state of the law prior to 1978, the court concluded:

> In light of these developments in the law, both state and federal, this Court has previously recognized the practical unavailability of a *Lockett* claim at the very time at issue in this case. This Court has described *Lockett* as a "direct reversal" of Florida mitigating circumstances law, and expressly held, with regard to a 1975 trial:
>
> > [The] trial occurred in 1975, one year before *Cooper* and three years before *Lockett*. It would be difficult to characterize the *Lockett* claim as "available" during petitioner's trial . . . .
>
> At the time Hargrave filed his appellate brief in state court, *Cooper* was prevailing precedent. As this Court has noted on several occasions, *Cooper* could be construed to be directly contrary to the United States Supreme Court's later decision in *Lockett*. Since Hargrave "lacked the tools to construct [his] constitutional claim," his failure to object to the judge's consideration only of statutory mitigating circumstances at the sentencing hearing and on appeal to the Florida Supreme Court must be excused. We thus conclude that Hargrave had cause for his default.

Id. at 1532-33 (citations omitted).

This decision is a faithful application of the *Reed v. Ross* rule that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with ap-

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[21] While eschewing any concession that the pre-*Lockett* statute had limited mitigating circumstances to the statutory factors, the Florida court has repeatedly recognized that, in pre-*Lockett* trials, "our death penalty statute could have been reasonably understood to preclude the introduction of nonstatutory mitigating evidence." *Harvard v. State*, 486 So.2d 537, 539 (Fla.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 215 (1986)(citations omitted) (granting post-conviction relief to defendant convicted in 1975 trial where trial counsel and sentencing judge believed mitigation limited to statutory factors); *see Lucas v. State*, 490 So.2d 943, 946-47 (Fla. 1986)(reversing 1977 death sentence because trial judge limited consideration of mitigation to statutory circumstances); *Muhammad v. State*, 426 So.2d 533, 538 (Fla. 1982), *cert. denied*, 464 U.S. 865 (1983)(refusing to find counsel ineffective in pre-*Lockett* trial for failure to present nonstatutory mitigating evidence because argument "presupposes that counsel was expected to predict the decision in *Lockett*"); *Perry v. State*, 395 So.2d 170, 174 (Fla. 1980)(reversing pre-*Lockett* sentence for exclusion of nonstatutory evidence ruled inadmissible under *Cooper* and recognizing that trial judge had "followed the law as he believed it was being interpreted at the time of the trial").

plicable state procedures." 468 U.S. at 16.[22] Petitioners have utterly failed to identify any conflict of authority engendered by this holding, or any other basis for reviewing the finding of cause by the Eleventh Circuit.

As their second reason for granting the writ, petitioners urge that the court below "has confused what constitutes cause for failing to raise a *Hitchcock* claim, and the actual prejudice necessary to prevail," Petition at 13, and faults the court's "complete elimination of the prejudice prong" of *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *United States v. Frady*, 456 U.S. 152 (1982). Petition at 25. This argument is refuted on the face of the Eleventh Circuit's opinion.

Petitioners argued below, as their sole response on the question of prejudice, that "[t]he identical argument presented herein was made and rejected" by the Eleventh Circuit in a line of pre-*Hitchcock* decisions (RA 136-40). Rejecting this argument, the court ruled as follows:

> We also hold that Hargrave would suffer actual prejudice if his *Lockett* claim were found to be procedurally barred. The State argues that Hargrave cannot establish prejudice because claims such as his have been rejected many times by this Court . . . .
>
> Since these decisions were rendered, how-

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22 Petitioners' suggestion that *Adams v. Dugger*, 804 F.2d 1526 (11th Cir. 1986), *modified on rehearing*, 816 F.2d 1493 (11th Cir. 1987), *cert. granted*, ___ U.S. ___ (Mar. 7, 1988), is a "similarly postured case," Petition at 13-14 & n.2, on the question of cause is incorrect. In *Adams*, the court of appeals permitted a challenge based upon *Caldwell v. Mississippi*, 472 U.S. 320 (1985), to be presented in a successive habeas corpus petition, 816 F.2d at 1495-96, and further ruled that if there had been any actionable state default on that claim, the petitioner had established cause for such default under *Reed v. Ross*, upon a finding that *Caldwell* claims were not reasonably available prior to 1985. *Id.* at 1497-1500.

In attacking this second holding on certiorari, the State of Florida raised, as its primary challenge, that the Eleventh Circuit's ruling is in direct conflict with decisions of the Supreme Court of Florida which hold that *Caldwell* is not a "change of law" which can be raised in the first instance on a collateral attack. Petition for Writ of Certiorari at 12-17, *Dugger v. Adams*, No. 87-121 (1987). No such argument can be raised with regard to the *Lockett* issue presented in this case; as has been set forth in this brief, the Eleventh Circuit and the Supreme Court of Florida are in complete harmony on the question whether *Lockett* claims arising from pre-1978 capital cases can be presented for the first time in collateral-attack proceedings. See n.14, *supra*.

> ever, the United States Supreme Court handed down its decision in *Hitchcock v. Dugger*, [citation omitted]. In this case, the Supreme Court overturned a death sentence imposed on a Florida defendant based on a *Lockett* claim similar to Hargrave's. *Hitchcock* has breathed new vitality into claims based on the exclusion of non-statutory mitigating factors, and Hargrave would be prejudiced if he were not now allowed to raise such a claim.

Hargrave v. Dugger, 832 F.2d at 1533 (citations omitted). It is thus manifest that the court was fully aware of its obligation under this Court's precedent to resolve the question of actual prejudice once cause for state default was found.[23]

Finally, in their only attack on the merits ruling below, petitioners claim that "guidance as to the applicability of [the] harmless error doctrine" is mandated, lest the court of appeals and the state supreme court "continue to misapply" *Hitchcock* without regard for that doctrine. Petition at 26. However, contrary to petitioners' assertion, the decisions of the Eleventh Circuit, as well as those of the Supreme Court of Florida, on this issue readily evidence awareness of the responsibility to apply the harmless error doctrine. *Compare Messer v. Florida*, 834 F.2d at 894-95 (11th Cir. 1987)(new sentencing required where non-statutory mitigation introduced, instructions prevented jury from considering such mitigation and trial court failed to consider mitigation outside statutory limits) *with Clark v. Dugger*, 834 F.2d 1561, 1569-70 (11th Cir. 1987)(instructional error harm-

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23 Prior to the decision in this case, the controlling standard in the Eleventh Circuit for actual prejudice in cases involving jury instructions challenged as violative of *Lockett* was established by *Ford v. Strickland*, 696 F.2d 804 (11th Cir.)(en banc), *cert. denied*, 464 U.S. 865 (1983), as "whether [the petitioner] has carried his burden in establishing that his jury perceived that in deciding whether to recommend life or death, it was denied the use of any nonstatutory mitigating factors," with the "entire charge . . . examined as a whole" and the trial court's treatment of mitigating circumstances also considered in the inquiry. *Id.* at 812-13. This standard was urged upon the court below by petitioners in their argument on prejudice (RA 137-39). While petitioners, in light of their paltry argument on prejudice before the Eleventh Circuit, can hardly fault the court's abrupt treatment of the issue, it bears notice that, in its evaluation of the merits of respondent's claim, the court below carefully examined all jury instructions, the record statements of the trial judge, the trial judge's treatment of mitigation, and the ruling of the state supreme court on direct appeal before determining that respondent's sentencing proceeding "did not comport" with *Lockett*. *Hargrave v. Dugger*, 832 F.2d at 1534-35.

less where defendant "failed to produce evidence of any nonstatutory mitigating factors"); *compare Nikenas v. Dugger*, No. 71,129 (Fla. Jan. 21, 1988)(instructional error not harmless where significant nonstatutory mitigation introduced) *with White v. Dugger*, No. 71,184 (Fla. Jan. 28, 1988)(instructional error harmless where proffered nonstatutory mitigation "would conclusively have had no effect" upon the advisory verdict). As for petitioners' alternative request that the cause be remanded for a harmless error inquiry, Petition at 27-28, it cannot go unnoticed that petitioners never argued in the court below that the errors in this case were harmless (RA 137-40, 146-47). Furthermore, with the instructional error and limited consideration of mitigation by the state trial and appellate courts unchallenged,[24] and with the presentation of significant non-statutory mitigation consistently conceded, both in the court below (RA 140, 144) and before this Court, Petition at 24 n.6, and specifically found by the Court of Appeals, *Hargrave v. Dugger*, 832 F.2d at 1534, petitioners' request for a remand on harmless error is utterly without merit.

---

[24] Petitioners do not attack the court's conclusion that the jury and judge in this case were denied the use of nonstatutory mitigating factors, in violation of *Lockett*, *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Hitchcock v. Dugger*.

CONCLUSION

Based upon the foregoing, respondent requests this Court to deny the petition for writ of certiorari in this cause.

Respectfully submitted,

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EDITOR'S NOTE

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. 87-1460

RICHARD L. DUGGER,
Secretary, Florida Department
of Corrections and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida,

Petitioners,

vs.

LENSON HARGRAVE,

Respondent.

APPENDIX TO BRIEF OF RESPONDENT IN OPPOSITION

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that the prosecutor's questions have been improper as to form and he has not at all reached the question of whether this juror is qualified as a matter of law to sit on a jury where there is a possibility of the imposition of capital punishment, particularly in light of what I believe to be an erroneous description of the system that the prosecutor has given to the jury.

THE COURT: I'd better make a better explanation of the process.

All right. Members of the jury, you may or may not have read of the present system under the laws of Florida concerning cases in which a defendant is accused of first degree murder. All of our present procedure is based on a fairly new law of about two years, entirely different from the procedures that had been in effect for many years prior to that time. Now, in this State, as stated by the prosecutor, we have what is known as a bifurcated trial, and that term, bifurcated-- I don't know why someone had to invent such a word, but it means a trial in two parts, and that isn't even quite true, because in many instances there's only one part to the trial. Right now, at this stage of the proceedings, we are interested in only one thing, really, in addition to

selecting a jury that is going to be impartial and fulfill their duty by listening to the instructions on the law by the court and fitting that law to the facts of the case as found by the jury. Now, inasmuch as the defendant is charged with first degree murder, the first and maybe only part of the trial will be a determination as to whether the jury finds under the law and the facts that the defendant is guilty of first degree murder. Now, in the event that the jury says not guilty, and not guilty of not only first degree murder or any form of unlawful homicide, the case is over; there won't be any second part of the trial. Now, likewise, if the jury instead of finding the defendant guilty of first degree murder were to find the defendant guilty of second degree murder or third degree murder or manslaughter, which are all to be considered also under a charge of first degree murder as what are called lesser degrees of unlawful homicide, if the jury were to find the defendant guilty of one of those lesser degrees, likewise, the trial as far as the jury is concerned would be over, because then under the law the court would impose the sentence within the limits proscribed by the law. However, in the event that the jury were to find unanimously as is required in any jury verdict on guilty or innocent,

find unanimously that the defendant is guilty of first degree murder, then we go into the second phase of the trial, because then the second phase is put into operation by law. The jury then would consider whether or not to recommend the death penalty or life imprisonment to the court.

Now, in this regard the prosecutor left out a little which I perhaps had better include for the benefit of the jury. That second part of the trial is not something upon which the jury is supposed to make a decision just on a matter of their own feelings or opinions arbitrarily. The law sets forth certain factors which the jury must take into consideration, and at that stage of the proceedings, the court supplies the jury orally and in writing with what are called aggravating circumstances which are listed in the law and mitigating circumstances, certain other circumstances that are listed in the law. The jury is asked to find which aggravating circumstances, if any, are present in the case, which mitigating circumstances, if any, are present, weigh the two, if there are some of each, and decide which outweigh the other, and then come in with a majority opinion. It does not have to be unanimous, but only a majority, a majority opinion recommending to the

court, to the judge, death penalty or life imprisonment with a minimum of twenty-five years. That is not binding on the court. The judge then makes a decision also as to these mitigating circumstances and aggravating circumstances with the help of the recommendation of the jury and the judge makes the fimal decision on the death penalty or life imprisonment.

Do any of you feel that the court--is anything that the court has said now raise any question in your mind? Do you all feel that you understand that?

It is a little complicated, but after we get used to it, it's not so complicated, but I do want to impress on you that that might not have been explained first. The decision of the jury as to life or death is not just an arbitrary one, but you are supposed to consider certain factors, and reach a recommendation based on what you find those factors to be.

Now, Mrs. Levine, is that it--Mrs. Lewis. All right. Now, Mrs. Lewis, you have stated that, I believe, that under no circumstances would you be able to vote for a death penalty. Do I understand you correctly?

MRS. LEWIS: Yes, sir.

JUL 23 1975
RICHARD P. BRINKER
CLERK

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY

STATE OF FLORIDA

VS

LENSON A. HARGRAVE,
DEFENDANT.

CASE NO. 75-118 A

FINAL JUDGMENT

FILED
JUL 18 1975
RICHARD P. BRINKER
CLERK

* * * * * * *

THIS CAUSE CAME on before the Court for trial by Jury, and after deliberations a verdict was rendered, finding the defendant guilty of Murder in the First Degree.

Thereafter, the defendant was adjudicated guilty by the Court, and the jury after hearing additional matters, retired to consider an advisory sentence pursuant to Florida Statute 921.141 (2). The majority returned and in open court recommended that this Court impose the death penalty upon the defendant.

This Court, independent of, but in agreement with, the advisory sentence rendered by the jury does hereby impose the death penalty upon the defendant LENSON A. HARGROVE, and in support thereof as required by Florida Statute 921.141 (3), submits this, its written findings upon which the sentence of death is based.

The findings of the Court are as follows:

1. That the aggravating circumstances found by the Court to be present and listed by the Court with the lettering as set forth in Florida Statute 921.141 (5), are as follows:

(d) That the capital felony was committed while the defendant was engaged in the attempt to commit a robbery.

(e) That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

(f) That the capital felony was committed for pecuniary gain.

(h) That the capital felony was especially heinous, atrocious or cruel, in that, after initially shooting the victim and while the victim lay helplessly bleeding on the floor, the

defendant deliberately leaned over the counter and shot the victim in the head.

2. That none of the remaining aggravating circumstances, set out by statute to be considered, were proved beyond a reasonable doubt.

3. That as to mitigating circumstances, the Court finds as follows:

(a) That there is some evidence of prior criminal activity on the part of the defendant; however, there have been no prior convictions so that it must fairly be said that the defendant has no significant history of criminal activity.

(b) That the defendant was not under the influence of extreme mental or emotional disturbance when the capital felony was committed.

(c) That the victim was not a participant in the defendant's conduct nor did he consent to his acts.

(d) That the defendant was not merely an accomplice in the capital felony committed by another person and that his participation was not relatively minor.

(e) That the defendant did not act under extreme duress or under the substantial domination of another person.

(f) That although there is some evidence of a personality defect in the defendant and some possibility of an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the Court finds that such capacity was not substantially impaired.

(g) That the age of the defendant at the time of the crime, that is, a few days less than 19 years, is a mitigating circumstance; however, he was, at the time of the crime, self-supporting as an adult being employed by a security company. The Court finds that the defendant is of average intelligence or possibly slightly less than average intelligence.

4. It may be, as alleged by the defense, that there could be some doubt as to whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired to some degree.

OR 9051 PG 475

There is no doubt that the defendant has a history of some mental abnormalities which may yet be affecting the defendant; however, it is the finding of the Court that such abnormalities only constitute a personality defect. A great number, possibly a majority of all persons who commit crimes, also have this or a similar type of personality defect.

5. The Court is in agreement with the Jury that the aggravating circumstances in this case outweigh the mitigating circumstances. Therefore, the Court has no choice under the law but to impose the death penalty upon the defendant, LENSON A. HARGRAVE.

WHEREFORE, IT IS,

ORDERED AND ADJUDGED as follows:

1. That you, LENSON A. HARGRAVE, be, and you are hereby sentenced to death.

2. That you are hereby remanded to the custody of the Dade County Department of Corrections to be conveyed to the State Division of Corrections for execution of this sentence according to law.

DONE AND ORDERED in open Court, at Miami, Dade County, Florida, this 18th day of July, A.D., 1975.

Gene Williams
CIRCUIT JUDGE

NOT FINAL UNTIL TIME ?IRES TO FILE REHEARING ! ?ITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1977

LENSON HARGRAVE,	:	
Appellant,	:	
vs.	:	CASE NO. 48,135
STATE OF FLORIDA,	:	
Appellee.	:	Circuit Court Case No. 75-118A

Opinion filed June 30, 1978

An Appeal from the Circuit Court in and for Dade County, Gene Williams, Judge

Bennett H. Brummer, Public Defender; and Paul Morris, Assistant Public Defender, Miami, Florida, for Appellant

Robert L. Shevin, Attorney General; and Carolyn M. Snurkowski, Assistant Attorney General, Tallahassee, Florida, for Appellee

PER CURIAM.

This cause is before us on direct appeal from a conviction of murder in the first degree and a sentence of death imposed by the Circuit Court for Dade County, Florida. Jurisdiction vests in this Court pursuant to Article V, Section 3(b)(1), Florida Constitution.

In the early evening of May 19, 1974, appellant committed a robbery at a U-Tote-M Store in Miami. In a statement which appellant later gave to police officers, he described what transpired at the

scene of the crime. When appellant entered the store, only the clerk was present. Appellant announced his intention to rob the store and ordered the clerk to relinquish the money in the cash register. The clerk's attempt to comply proved futile when the register jammed. His demand not met, appellant shot the employee twice in the chest. He then endeavored to open the cash register himself but was unable to do so. Thereupon, a customer walked in. Appellant diverted him without arousing suspicion. When the customer exited, appellant proceeded to shoot his victim for the third time. Appellant later claimed that he fired the third shot from a fear of being apprehended.

After the killing, at a nearby parking lot, appellant met a friend, Lawrence Karge, who had previously been employed at the U-Tote-M Store in which the robbery and murder of the cashier occurred. Karge had planned the robbery with Hargrave and had given appellant detailed information about the store's alarm and security devices. Karge drove Hargrave home, where the appellant remained for a short time before leaving for his job as a night security guard.

Approximately seven months later, an informant named Terry Morton contacted the Miami Police Department relative to the U-Tote-M Store homicide. Both Karge and appellant, on separate occasions, had told the informant about the homicide.

Two days after receiving this information, the police placed the respective residences of Karge and Hargrave under surveillance. Shortly thereafter a vehicle which contained the two suspects was stopped. Appellant was taken to the homicide office where he waived his Miranda rights and signed a statement confessing to the killing and identifying the location of the murder weapon.

At a suppression hearing, appellant's counsel sought to prevent admission of both the inculpatory statement and the murder weapon as the fruits of an illegal arrest. The trial court found the confession voluntary. Both items were admitted into evidence. At the conclusion of the trial, the jury found Hargrave guilty of first degree murder.

At the penalty trial, testimony was received from both

state and defense witnesses which suggested that the appellant was mentally deficient, insecure, and fearful. The State also produced two witnesses--Karge's girlfriend and the informant's sister--who testified that the appellant had told each of them that he had killed someone before, and that it would not bother him to kill again.

The jury returned an advisory sentence of death. At a sentencing hearing before the judge on July 18, 1975, defense counsel moved that the court order a presentence report pursuant to Fla. R. Crim. P. 3.710. Defense counsel proffered the fact that the instant conviction was the defendant's first felony conviction. The motion was denied. The trial judge entered the following judgment imposing the death penalty.

> THIS CAUSE CAME on before the Court for trial by Jury, and after deliberations a verdict was rendered, finding the defendant guilty of Murder in the First Degree.
>
> Thereafter, the defendant was adjudicated guilty by the Court, and the jury after hearing additional matters, retired to consider an advisory sentence pursuant to Florida Statute 921.141 (2). The majority returned and in open court recommended that this Court impose the death penalty upon the defendant.
>
> This Court, independent of, but in agreement with, the advisory sentence rendered by the jury does hereby impose the death penalty upon the defendant LENSON A. HARGROVE,[sic] and in support thereof as required by Florida Statute 921.141 (3), submits this, its written findings upon which the sentence of death is based.
>
> The findings of the Court are as follows:
>
> 1. That the aggravating circumstances found by the Court to be present and listed by the Court with the lettering as set forth in Florida Statute 921.141 (5), are as follows:
>
> (d) That the capital felony was committed while the defendant was engaged in the attempt to commit a robbery.
>
> (e) That the capital felony was committed for the purpose of avoiding or preventing a lawful arrest.
>
> (f) That the capital felony was committed for pecuniary gain.
>
> (h) That the capital felony was especially heinous, atrocious or cruel, in that, after initially shooting the victim and while the victim lay helplessly bleeding on the floor, the defendant deliberately leaned over the counter and shot the victim in the head.
>
> 2. That none of the remaining aggravating circumstances, set out by statute to be considered, were proved beyond a reasonable doubt.
>
> 3. That as to mitigating circumstances, the Court finds as follows:

(a) That there is some evidence of prior criminal activity on the part of the defendant; however, there have been no prior convictions so that it must fairly be said that the defendant has no significant history of criminal activity.

(b) That the defendant was not under the influence of extreme mental or emotional disturbance when the capital felony was committed.

(c) That the victim was not a participant in the defendant's conduct nor did he consent to his acts.

(d) That the defendant was not merely an accomplice in the capital felony committed by another person and that his participation was not relatively minor.

(e) That the defendant did not act under extreme duress or under the substantial domination of another person.

(f) That although there is some evidence of a personality defect in the defendant and some possibility of an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the Court finds that such capacity was not substantially impaired.

(g) That the age of the defendant at the time of the crime, that is, a few days less than 19 years, is a mitigating circumstance; however, he was, at the time of the crime, self-supporting as an adult being employed by a security company. The Court finds that the defendant is of average intelligence or possibly slightly less than average intelligence.

4. It may be, as alleged by the defense, that there could be some doubt as to whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired to some degree. There is no doubt that the defendant has a history of some mental abnormalities which may yet be affecting the defendant; however, it is the finding of the Court that such abnormalities only constitute a personality defect. A great number, possibly a majority of all persons who commit crimes, also have this or a similar type of personality defect.

5. The Court is in agreement with the Jury that the aggravating circumstances in this case outweigh the mitigating circumstances. Therefore, the Court has no choice under the law but to impose the death penalty upon the defendant, LENSON A. HARGRAVE.

WHEREFORE, IT IS,

ORDERED AND ADJUDGED as follows:

1. That you, LENSON A. HARGRAVE, be, and you are hereby sentenced to death.

2. That you are hereby remanded to the custody of the Dade County Department of Corrections to be conveyed to the State Division of Corrections for execution of this sentence according to law.

DONE AND ORDERED in open Court, at Miami, Dade County, Florida, this 18th day of July, A.D., 1975.

/s/ GENE WILLIAMS
CIRCUIT JUDGE

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On this appeal appellant urges three points for reversal. Each relates only to the sentence imposed. We restate the points in the order of our treatment of them: (i) whether the imposition and execution of the sentence of death under Section 921.141, Florida Statutes (1975), constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution; (ii) whether the trial court erred in sentencing the defendant without the benefit of a presentence investigation report as requested by defense counsel; and (iii) whether the trial court erred in imposing the death penalty. Before directing our attention to the specific points raised by appellant, we note that pursuant to Fla. App. Rule 6.16b. we have reviewed the evidence to determine if the interests of justice require a new trial. We conclude that the verdict and the judgment of guilt do not fail for insufficiency of the evidence. Implicit in this determination is our concurrence in the ruling by the trial court upon the motion to suppress.

With respect to the first issue raised, this Court's decision in State v. Dixon, 283 So.2d 1 (Fla. 1973), and the decision of the United States Supreme Court in Proffitt v. Florida, 96 S.Ct. 2960 (1976), are dispositive.

To the same extent, our decision in Thompson v. State, 328 So.2d 1 (Fla. 1976), determines adversely to appellant his assertion that the trial court was required by Fla. R. Crim. P. 3.710 to request a presentence investigation before sentencing Hargrave. In Thompson this Court concluded, essentially, that upon return of a verdict of guilty in a first degree murder case the discretion of the trial judge is limited to two alternatives, i.e., death or life imprisonment. Probation is not a sentence alternative and, therefore, the second sentence of Fla. R. Crim. P. 3.710 is inapplicable in a death case. The import of the mandatory provisions of Rule 3.710 is made clear by the fact that it exempts the necessity for a presentence investigation report for first felony offenders and those under age 18 where probation has already been determined by the judge to be the appropriate sentence. Furthermore, that the failure of the trial court

to order an investigation was not prejudicial to appellant is apparent from the face of the sentencing judgment. The trial court did not find as an aggravating circumstance that appellant had previously been convicted of another capital felony or of a felony involving the use or threat of violence to another person. Rather the trial court found in mitigation that although there was some evidence of prior criminal activity on the part of the defendant, there were no prior convictions "so that it must fairly be said that the defendant has no significant history of criminal activity."

We come now to that part of our function of review under this State's death statute which is different from the scope of this Court's review in all other proceedings. We are mandated by Section 921.141(4), Florida Statutes (1975), automatically to review not only the judgment of conviction, but also the sentence of death. As pointed out in Proffitt v. Florida, supra, the final review of sentence in this Court supplies the channeled discretion and deliberation necessary to avert the constitutional deficiencies condemned in Furman v. Georgia, 408 U.S. 238 (1972). However, this Court's role is not and should not be to cast aside that careful deliberation which the matter of sentence has already received by the jury and the trial judge, unless there has been a material departure by either of them from their proper functions prescribed by Section 921.141, Florida Statutes (1975), or unless it appears that in view of other decisions concerning imposition of the death penalty the punishment is too great. State v. Dixon, supra.

In the instant case appellant maintains there has been just such a departure by the trial judge in (i) finding two aggravating circumstances arising out of the single act of attempted robbery (those set forth in Section 921.141(5)(d) and (f), Florida Statutes [1975]); (ii) finding that the capital felony was especially heinous, atrocious, or cruel; and (iii) failing to find the existence of three mitigating circumstances disclosed by the evidence. The asserted mitigating circumstances are: (a) Section 921.141(6)(b)--defendant was under an extreme mental or emotional

disturbance; (b) Section 921.141(6)(f)--the defendant's capacity to conform his conduct to the requirements of law or appreciate the criminality of his act was substantially impaired; and (c) Section 921.141(6)(e)--defendant was substantially dominated by another person.

We deal first with the aggravating circumstances. Although Provence v. State, 337 So.2d 783 (Fla. 1976), condemns the doubling up of the aggravating circumstance of pecuniary gain each time a crime such as robbery is concerned, the mere recitation of both circumstances does not in all cases call for a condemnation of the sentencing hearing and judgment. As State v. Dixon, supra, teaches us, the statute does not comprehend a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum. It requires a weighing of those circumstances. Absent the circumstance of pecuniary gain, there were ample other statutory aggravating circumstances to place on the scale to weigh against the valid mitigating circumstances.

Appellant questions the trial court's finding of one of those additional aggravating circumstances when he states that it is improper under several of our earlier decisions to characterize this capital felony as especially heinous, atrocious, or cruel. The trial judge made this finding predicated upon the defendant's act of deliberately shooting the victim in the head after he had already rendered him helpless by shooting him twice in the chest. In more common terms, the appellant in a calculated fashion "executed" the victim to avoid later identification. A short colloquy from the appellant's inculpatory statement is instructive on this point:

DETECTIVE MAJOR: "When you shot the clerk the third time, did you intend to kill him?"

THE DEFENDANT: "Yes, I did."

DETECTIVE MAJOR: "Why did you want to kill the clerk?"

THE DEFENDANT: "Because I was scared, and I was aggravated."

DETECTIVE MAJOR: "Why were you scared?"

THE DEFENDANT: "I was afraid I was going to get caught."

To this may be added the testimony of Karge's girlfriend and Morton's sister who stated that appellant had told each of them that he had killed someone before, and it would not bother him to kill again. The sum of all this evidence justifies a finding that the appellant's act of firing the third shot into the head of the victim was "extremely wicked or shockingly evil." See Alford v. State, 307 So.2d 433, 444 (Fla. 1975); State v. Dixon, supra.

Returning to appellant's argument that the trial judge erred in failing to find the mitigating circumstances delineated above, we respond that the jury and the judge could have resolved the evidence in favor of appellant's position, but neither was compelled to do so. We are not here dealing with a case where either the jury or the court considered matters it should not have considered or failed to consider matters it should have considered. Appellant simply disagrees with the force and effect given to the testimony of a psychologist and a psychiatrist at the sentencing hearing. The trial judge conscientiously assessed the testimony of the experts and found that although there was "some evidence of a personality defect in the defendant and some possibility of an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the Court finds that such capacity was not substantially impaired." (Emphasis supplied) The trial judge further observed that appellant is of average intelligence or possibly slightly less than average intelligence. It is apparent, then, that the trial judge did not ignore or fail to consider the psychological evidence bearing on mitigation. Obviously, he and the jury were not persuaded that it provided a sound basis for establishment of the statutory mitigating circumstances.

The proposition that appellant was under the domination of Karge is in the same posture. Although the defense psychiatrist offered evidence that Hargrave could be dominated, and although appellant's mother testified that her son was dominated by Karge, the State's psychologist, who tested both Hargrave and Karge,

concluded that appellant "certainly played the dominant role." Clearly the jury and the judge who heard the testimony resolved the conflict against the appellant.

In the performance of our constitutional duty, we have reviewed the same testimony and evidence upon which the trial judge and jury based their conclusions. We cannot say that the judgment reached by them is at material variance with our interpretation of the evidence, nor is it contrary to law. Accordingly, the judgment of conviction and the sentence of death are hereby affirmed.

It is so ordered.

OVERTON, C.J., ADKINS, ENGLAND and SUNDBERG, JJ., Concur
BOYD, J., Concurs in part and dissents in part with an opinion
HATCHETT, J., Concurs in part and dissents in part with an opinion

BOYD, J., Concurring in part and dissenting in part.

I concur in the majority opinion affirming appellant's guilt. The aggravating circumstances found by the trial court are supported by evidence in the record.

As to mitigating circumstances, the trial judge found two: (a) Hargrave's youth at the time of the crime (he was eighteen), Section 921.141(6)(g), and (b), no significant history of prior criminal activity, Section 921.141(6)(a). As recognized by the majority, there might be added, since there is competent evidence of them in the record, two other mitigating circumstances: that Hargrave's appreciation of the criminality of his conduct was substantially impaired, Section 921.141(6)(f), and that he was under the substantial domination of another person, Section 921.141(6)(e).

In my opinion the quality of the two mitigating circumstances measured against the aggravating circumstances tips the sentencing scale in favor of life. The balance is more clearly in favor of life if the two mitigating circumstances not found by the trial judge,[1] but which have some support in the record, are considered.

I would reduce the sentence to life imprisonment without eligibility for parole for twenty-five years.

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[1] Even the trial judge had second thoughts about the "substantial impairment" circumstance. See Finding No. 4, p. 3, of the majority opinion.

HATCHETT, J., concurring in part and dissenting in part

I concur in the conviction but agree with appellant that the trial judge committed error in sentencing him without benefit of a presentence investigation report and would return the case to the trial court for resentencing.

Florida Rule of Criminal Procedure 3.710 provides:

> In all cases in which the court has discretion as to what sentence may be imposed, the court may refer the case to the probation and parole commission for investigation and recommendation. No sentence or sentences other than probation shall be imposed on any defendant found guilty of a first felony offense or found guilty of a felony while under the age of 18, until after such investigation has first been made and the recommendations of the Commission received and considered by the sentencing judge.

The rule clearly requires a judge to order a presentence investigation report in all cases where a defendant has not previously been convicted of a felony. Harden v. State, 290 So.2d 551 (Fla. 1st DCA 1974); Mitchum v. State, 292 So.2d 620 (Fla. 1st DCA 1974); Still v. State, 296 So.2d 67 (Fla. 1st DCA 1974); Nordone v. State, 307 So.2d 907 (Fla. 3rd DCA 1975); Lopes v. State, 309 So.2d 591 (Fla. 2nd DCA 1975); Buckles v. State, 310 So.2d 748 (Fla. 1st DCA 1975); Grubbs v. State, 311 So.2d 411 (Fla. 2nd DCA 1975); Davenport v. State, 317 So.2d 851 (Fla. 1st DCA 1975); Beverly v. State, 330 So.2d 527 (Fla. 1st DCA 1976). The record shows that appellant had no prior felony convictions. He was thus entitled to the benefit of a presentence investigation.

Relying on Thompson v. State, supra, the majority holds that once the jury returns a verdict of first degree murder the trial court is exempt from the mandatory presentence requirements of the rule. The court in Thompson based its decision on the committee note following the rule:

> The rule provides for the utilization of a presentence report as part of the sentencing process. While use of the report is discretionary in all cases, it is mandatory in two instances, the sentencing of a first felony offender and of a defendant under 18 years of age. Of course, no report is necessary where the specific sentence is mandatory, e. g., the sentence

> of death or life imprisonment in a verdict of first degree murder. (emphasis added)

This comment was written in 1972, prior to Furman v. Georgia, 408 U.S. 238 (1972) and prior to enactment of Section 921.141, Florida Statutes (1973). In 1972, the sentence of death in a capital case was, as the comment states, mandatory in the absence of a recommendation of mercy by the jury.* In cases in which the jury recommended mercy, life imprisonment was mandatory. Our present capital punishment scheme places in the trial judge discretion he did not have at the time the rule was promulgated. The comment based on the old statute is no longer valid.

The majority holds "probation is not a sentence alternative, and therefore the second sentence of Fla. R. Crim. P. 3.710 is inapplicable in a death case." The rule itself is not limited to cases in which probation is an alternative. It does not dictate how many or what kind of sentencing alternatives the trial judge must have. It speaks only in terms of "discretion as to what sentence may be imposed." Florida judges now have discretion (reasonable and controlled) as to what sentence may be imposed in a capital case. State v. Dixon, 283 So.2d 1 (1973). This is all that is required to trigger the rule. We so held in Swan v. State, 322 So.2d 485 (Fla. 1975) at 488:

> P.S.I. reports are provided for in Fla. R. Cr. P. 3.710. Rule 3.710 vests the trial court with the discretionary power to request a P.S.I. report in cases wherein the trial court possessed discretion as to the imposition of sentence. Section 921.141, Florida Statutes, vests the trial court with the limited discretion to impose either the death penalty or life imprisonment even if the jury recommends to the contrary. Thus, the discretionary nature of Section 921.141 brings it within the ambit of Rule 3.710.

The position taken by the majority, in its reliance on Thompson, suggesting that there is no sentencing discretion left in the trial judge raises serious questions concerning

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* Section 921.141, Fla. Stat. (1971) states in pertinent part:
(1) Recommendation to mercy.--A defendant found guilty by a jury of an offense punishable by death shall be sentenced to death unless the verdict includes a recommendation to mercy by the jury. When the verdict includes a recommendation to mercy by the jury, the court shall sentence the defendant to life imprisonment.

the constitutionality of our present statute. Woodson v. North Carolina, 428 U.S. 280 (1976). Thompson should be overruled, not followed, in order to prevent any doubt as to the constitutionality of our statute.

In imposing sentence in a capital case, the fundamental respect of humanity underlying the Eighth Amendment requires the trial judge to take into consideration the character and record of the defendant as well as the offense for which he was convicted. Woodson v. North Carolina, supra. Practically speaking, at a time when state attorneys are seeking the means to pay witness fees for witnesses to travel from one county to another where there has been a change of venue, when public defenders are hard pressed to get funds for depositions, it is unrealistic to believe that a defendant facing sentence without the benefit of presentence investigation reports will be able to present to the sentencing judge out of state school reports, health records, or other favorable information regarding his character and record.

The rule as construed by the majority requires a presentence investigation report for all offenders under 18 years of age or convicted of a first felony offense, except those convicted of first degree murder. If presentence investigation reports are to be mandatory for anyone, surely they should be mandatory where one faces the ultimate penalty.

IN THE SUPREME COURT OF FLORIDA

CASE NO. 48,135

LENSON ALFRED HARGRAVE,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

PETITION FOR REHEARING

The appellant requests that this Court grant rehearing in this cause.

1. On June 30, 1978 this Court filed a split (4-2) opinion affirming the appellant's conviction and sentence of death.

2. On July 12, 1978 counsel for the appellant filed a Motion to Withdraw Opinion and for Leave to File Brief and a Motion to Stay Time for Filing Petition for Rehearing Pending Ruling on Motion to Withdraw Opinion.

3. On July 17, 1978, upon consideration of the latter motion, this Court ordered that the "Petition for Rehearing is extended until disposition of Motion to Withdraw or August 7, 1978, whichever occurs first."

4. This petition for rehearing is being filed to comply with the deadline. However, counsel for the appellant submits that withdrawal of the opinion is the appropriate action to be taken by this Court for the reasons set forth in the Motion to Withdraw and thus renews said Motion.

5. In the event the Motion to Withdraw is not granted, the following grounds are presented in support of this petition for rehearing.

I.

THE FLORIDA DEATH PENALTY STATUTE UNCONSTITUTIONALLY LIMITS CONSIDERATION OF MITIGATING CIRCUMSTANCES.

In promulgating the Florida death penalty statute,[1] the Florida Legislature assumed that mitigating-circumstances would have to be limited in order to comply with the ruling in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) that unbridled jury discretion to impose or recommend a death sentence was constitutionally prohibited. This legislative intent was relied upon by this Court in Cooper v. State, 336 So.2d 1133 (Fla. 1976). Cooper held that the trial judge had properly excluded non-statutory mitigating evidence concerning: Cooper's employment, the co-defendant's reputation for violence and Cooper's attempts to avoid the co-defendant. The exclusion of the evidence in mitigation of the death sentence comported with the intent of the Florida Legislature:

> The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal. Such evidence threatens the proceeding with the undisciplined discretion condemned in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).[7]

[7] The legislative intent to avoid condemned arbitrariness pervades the statute. Section 921.141(2) requires the jury to render its advisory sentence "upon the following matters: (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6): (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist . . . ." (emphasis added). This limitation is repeated in Section 921.141(3), governing the trial court's decision on the penalty. Both sections 921.141(6) and 921.141(7) begin with words of mandatory limitation. This may appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether operating for or against the death penalty.

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[1] Section 921.141, Florida Statutes (1972).

Cooper v. State, supra at 1139. (The continuing vitality of Cooper is evidenced by the opinion filed in this cause wherein the majority concluded that the defendant's psychological deficiencies did not provide "a sound basis for establishment of the statutory mitigating circumstances." Slip opinion at 8.)

The same legislative intent pervaded the Ohio death penalty statute which limited defendants to statutorily enumerated mitigating circumstances. That limitation led the Court in Lockett v. Ohio, ___ U.S. __ (1978), to hold the Ohio statute unconstitutional as violative of the Eighth and Fourteenth Amendments to the Constitution of the United States. Noting that the Ohio Legislature limited the mitigating circumstances in response to Furman,[2] the plurality held:

> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Rights and Fourteenth Amendments.[3]
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> * * *
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> The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendment. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.[4]

Quite clearly, the Florida Legislature has precluded consideration of relevant mitigating circumstances[5] by limiting

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[2] Lockett v. Ohio, supra, n. 7.

[3] 98 S.Ct. at 2965.

[4] Ibid.

[5] Obviously relevant mitigating circumstances such as prospects for rehabilitation, employment background, life sentences imposed in similar cases, lack of premeditation, familial responsibility, military background, recognition of guilt, are not listed in the Florida death penalty statute.

defendants to those circumstances listed in Section 921.141(6)(a)-(g).[6]

Thus, the Florida death penalty statute suffers from the same constitutional infirmities as the Ohio statute. Accordingly, rehearing should be granted and the sentence of death reversed and reduced to life pursuant to § 775.082(2), Florida Statutes.

II.

THE FLORIDA DEATH PENALTY STATUTE WAS UNCONSTITUTIONALLY APPLIED AT THE SENTENCING PROCEEDINGS.

At the commencement of the advisory sentencing proceeding, the jury was impermissibly instructed[7] that its consideration of mitigating circumstances was limited to those enumerated in the death penalty statute, even though the jury had heard (and was about to hear) evidence of mitigating

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[6] In upholding the Florida death penalty statute in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), the Supreme Court of the United States mistakenly assumed that Florida defendants would not be so limited. The Court so stated in Lockett, 98 S.Ct. at 2965-2966.

> Although the Florida statute approved in Proffitt contained a list of mitigating factors, six members of this Court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive.

[7] R. 984. The lack of objection to the instructions does not bar review of the instructions. In Terminiello v. Chicago, 337 U.S. 1, 3-5, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) and Stromberg v. California, 283 U.S. 359, 363-365 (1931), jury instructions purporting to construe a state statute permitted conviction upon grounds that would be federally unconstitutional (alternatively with other grounds that would be constitutional). In neither case did defense counsel object to the instructions; rather, in each case, a general attack was made on the validity of the entire statute under the federal constitution, as is the case here. (R. 473). In both cases, the upholding of the federal constitutional contentions resulted in the overturning of the convictions, notwithstanding the lack of objections to the instructions.

Note also the general rule of O'Connor v. Ohio, 385 U.S. 92, 87 S.Ct. 252, 17 L.Ed.2d 189 (1966), that federal constitutional claims cannot be waived by failing to raise them prior to the United States Supreme Court decision (here, Lockett v. Ohio) which announces their very existence.

circumstances not listed in the statute.[8] The jury was given these erroneous instructions in writing upon the conclusion of the advisory sentencing proceeding. (R. 985).

Moreover, the trial judge himself limited his consideration of mitigating circumstances to those listed in the statute. He stated that he could not "go outside of" the enumerated mitigating circumstances to which he had restricted the jury. (R. 1091). The trial court felt bound by the statutory "standards" which were legislatively promulgated, in his opinion, "to eliminate as much as possible the individualistic characteristics and personalities of various defendants. . . ." (R. 1105). Thus, the trial court's sentencing order, regarding mitigating circumstances, is limited to a discussion of the statutory circumstances only. (R. 1108-1110, 1224-5).

The trial court's blatant disregard for the individual characteristics of the defendant resoundingly clashes with the holdings of Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). These decisions, which require individualized sentencing in capital cases, led to the following rule enunciated in Lockett v. Ohio, supra:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest

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[8] The jury was instructed that the advisory sentence was to be based upon evidence heard while trying the guilt or innocence of the defendant as well as evidence heard at the advisory sentencin proceeding. (R. 982). Mitigating evidence adduced, such as the defendant's employment (R. 997), the defendant's lack of intelligence (R. 991), the defendant's brain damage (R. 991-2, 1005-6), the defendant's drug usage (R. 992, 1046), the defendant's sociopathic personality (R. 993, 1000, 1045), the defendant's deviant thoughts and weak ego (R. 994), the defendant's honesty and forthrightness (R. 999, 1048), the defendant's parents' desires to prevent the defendant from associating with the co-defendant (R. 1051), parental guidance and responsibility (R. 105 etc., could not be considered by the jury because of the limiting instructions.

> kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands but public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques--probation, parole, work furloughs, to name a few--and various post conviction remedies, may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

98 S.Ct. at 2965.

In the case at bar, the defendant was not afforded individualized consideration by either the jury or the judge. As such, the death sentence in this case lacks "the need for reliability in the determination that death is the appropriate punishment in a specific case," Woodson v. North Carolina, 428 U.S. at 305 (1976), and impermissibly conflicts with the Eighth Amendment rule in Lockett which was designed to assure the requisite reliability by averting "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 98 S.Ct. at 2965. Hargrave's sentence of death cannot stand.

III.

A NEW SENTENCING HEARING IS REQUIRED PURSUANT TO ELLEDGE v. STATE, 346 So.2d 998 (Fla. 1977).

Elledge v. State, 346 So.2d 998 (Fla. 1977) announced the rule that a defendant sentenced to death is entitled to a new sentencing hearing where an aggravating circumstance has been improperly considered in the weighing process of aggravating and mitigating circumstances. The reasoning was clearly enunciated:

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the factor of the Gaffney murder shall not be considered. See Miller v. State, 332 So.2d 65 (Fla. 1976); Messer v. State, 330 So.2d 137 (Fla. 1976).

346 So.2d at 1003. This holding was reaffirmed in Jackson v. State, ___ So.2d ___ (Fla., Case No. 48,165, March 9, 1978), discussed infra at n. 10 and Gibson v. State, 351 So.2d 948 (Fla. 1977).

In the case at bar, the impermissible aggravating factor was the finding that the capital felony was committed for pecuniary gain.[9] Consideration of this factor was impermissible pursuant to the rule announced in Provence v. State, 337 So.2d 783 (Fla. 1976), which bars the weighing of the aggravating factor of pecuniary gain, § 921.141(5)(f), where that aspect of the crime was also deemed to constitute the aggravating factor that the crime was committed while the defendant was engaged in a robbery, § 921.141(5)(d).

In the opinion filed in this case, this Court recognized that such an impermissible factor entered into the weighing process. But rather than follow the precedent of Elledge

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[9] The prosecutor argued to the jury at R. 1059-1060, and to the judge at R. 1102 that both aggravating factors (d) and (f) applied. The judge agreed in his sentencing order at R. 1223.

and afford the defendant a new sentencing hearing, this Court discounted the consideration of the impermissible factor in one sentence:

> Absent the [impermissible aggravating] circumstance of pecuniary gain, there were ample other statutory aggravating circumstances to place on the scale to weigh against the valid mitigating circumstances.

Hargrave v. State, slip opinion at 7.

How can this possibly be true of Hargrave and not Elledge, especially where the trial court found no mitigating circumstances in his order in Elledge's case, and the trial judge in Hargrave's case found at least two? The equal protection and due process violations which result from this disparate treatment are obvious. Moreover, this type of "harmless error" approach to a capital case,[10] violates the previously discussed Lockett and Woodson Eighth Amendment rules designed to assure the requisite reliability in determining the appropriateness of the death penalty in a particular case.[11]

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[10] And by no means can one reasonably suggest that the error here is harmless "beyond a reasonable doubt," which is the applicable standard for constitutional error. Chapman v. California, 386 U.S. 18 (1967). At best, three aggravating circumstances were applicable to Hargrave. (See R. 1223-4). Two statutory mitigating circumstances were established to the satisfaction of the trial court. Evidence supporting an additional two statutory mitigating circumstances was sufficient so

> "that the jury and the judge could have resolved the evidence in favor of appellant's position, . . ."
> Slip opinion at 8.

It is impossible to ensure "beyond a reasonable doubt" that the outcome of the weighing process would not have been different absent the impermissible consideration of the pecuniary gain circumstance.

Thus, where one aggravating circumstance is treated as two in violation of Provence and even one mitigating circumstance is present, reversal is required. See Jackson v. State, ___ So.2d ___ (Fla., Case No. 48,165, March 9, 1978) where a Provence violation was not reversible error only because there were no mitigating circumstances.

[11] The Florida death penalty statute was approved due to the reliability guaranteed by its requirement that the weighing process be performed by the jury and then by the trial judge prior to the independent review by this Court. State v. Dixon, 283 So.2d 1 (Fla. 1973). The harmless error approach of this Court to Hargrave's sentence deprives this defendant of the safeguard of this initial dual-step weighing process in violation of the Equal Protection Clau

As in Elledge, at least a doubt must exist as to what weight the jury and judge gave the impermissible pecuniary gain circumstance. Ordinarily, reversal is required where there is a doubt as to whether a judgment rests upon a constitutionally unsound footing. See, e.g., Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91-92 (1965). See also n. 10, supra. Obviously, that rule must apply with added force in death penalty cases; the taking of human life on the basis of any ambiguity as to whether constitutional requirements were observed would be manifestly intolerable. This Court has frequently asserted its "responsibility and obligation . . . to deal cautiously with judgments imposing the extreme penalty," Williams v. State, 117 So.2d 473, 476 (Fla. 1960), because "[t]here is absolute finality in an executed sentence of death," Wells v. State, 98 So.2d 795, 801 (Fla. 1957), and "errors which could make the difference between life and death can hardly be deemed harmless and trivial." Pait v. State, 112 So.2d 380, 386 (Fla. 1959). See also, Coxwell v. State, ___ So.2d ___ (Fla., Case No. 51,013, July 20, 1978).

The Eighth and Fourteenth Amendments to the Constitution of the United States and Elledge v. State, supra, require reversal for a new sentencing hearing.

IV.

THE LOWER COURT'S FINDING THAT THE MURDER OF WHICH THE DEFENDANT WAS CONVICTED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY WAS IMPROPER AND MANDATES REVERSAL PURSUANT TO ELLEDGE v. STATE, SUPRA.

Section 921.141(6)(e), Florida Statutes, lists the following as an aggravating circumstance:

> The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

In the case at bar, the trial court found this aggravating circumstance to have been applicable. (R. 12-23). This Court neither approved nor disapproved this finding. However, the finding was not applicable to the case at bar.

In Gibson v. State, 351 So.2d 948 (Fla. 1977) the trial court made the following finding regarding the inapplicability of this aggravating circumstance:

> (e) Whether the murder of which the defendant was convicted was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
> Finding: The murder had the purpose of silencing the victims of the robbery. It was not, however, directly committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

351 So.2d at 951, n. 5. Although this Court held that the trial court in Gibson had improperly interpreted aggravating circumstances (d) and (f), the above reasoning was not held by this Court to be an erroneous interpretation of aggravating circumstance (e).

The same reasoning applies to the case sub judice. No proof beyond a reasonable doubt established that Lenson Hargrave committed the murder directly for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. At best, the state can only contend that Hargrave intended to silence the victim.

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States mandates that the defendant be afforded the same application of this aggravating circumstance as was afforded the defendant in Gibson.

The improper consideration of this aggravating circumstance mandates reversal since mitigating circumstances exist. Elledge v. State, supra. See also, Jackson v. State, supra.

V.

THE LOWER COURT'S FINDING THAT THE DEFENDANT'S EMPLOYMENT WAS AN AGGRAVATING CIRCUMSTANCE WAS IMPROPER AND MANDATES REVERSAL PURSUANT TO ELLEDGE v. STATE, SUPRA.

The trial court found that although the defendant's age was a mitigating circumstance, this circumstance was offset by the fact that the defendant was "at the time of the crime, self-supporting as an adult being employed by a security company." (R. 1222).

Thus, the defendant's employment status was weighed as an aggravating circumstance. Yet, employment status is not a statutorily delineated circumstance. See § 921.141(5). Thus, its consideration was erroneous. Proffitt v. Florida, 428 U.S. at 250, n. 8 (1976); Elledge v. State, 346 So.2d 998 (Fla. 1977).

As such, the defendant is entitled to a new sentencing hearing since mitigating circumstances were found. Ibid; see also Point III, supra and the federal constitutional provisions cited therein.

VI.

THIS COURT IMPROPERLY RELIED UPON A NONSTATUTORY, IRRELEVANT CIRCUMSTANCE TO SUPPORT THE SENTENCE OF DEATH.

In Huckaby v. State, 343 So.2d 33, n. 11 (Fla. 1977) this Court held:

> The trial judge found that Huckaby had a propensity to commit rape, and therefore the very fact that he was alive would create risk of harm to many persons and menace society. This attempt to predict future conduct is without relation to any statutory aggravating circumstance and must be stricken.

This Court violated the Huckaby holding by using the following factor to support a death sentence:

> [T]he testimony of Karge's girlfriend and Morton's sister who stated that appellant had told - each of them that he had killed someone before, and it would not bother him to kill again.

Slip opinion at 8.

Whether the appellant would kill again is an irrelevant non-statutory aggravating circumstance. Huckaby v. State, supra.[12] Additionally, the reliance upon this factor suggests that this Court may have been laboring under the misconception that the defendant has committed a previous crime by having "killed someone before." Yet, the comment referred to the crime in question (R. 1033-1034, 1038-1039); the defendant has no prior criminal activity.

A re-evaluation of whether the crime was especially heinous, atrocious or cruel, without consideration of this impermissible factor, is required.

VII.

THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S REQUEST FOR A PRESENTENCE INVESTIGATION AND THIS COURT'S APPROVAL OF THE DENIAL VIOLATES THE DEFENDANT'S RIGHTS TO EQUAL PROTECTION UNDER THE LAW AND DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED BY THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Presentence investigations should be accorded all defendants convicted of capital offenses. See slip opinion

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[12] Indeed, this was the precise ground raised by defense counsel in his objection to this testimony at the advisory sentencing proceeding. (R. 1029). Additionally, it should be noted that the erroneous admission of this testimony was not raised on appeal because the trial judge did not consider the testimony in holding the offense to be "especially heinous, atrocious, or cruel" (R. 1224), as this Court has.

at 11-13 (Hatchett, J., dissenting).[13] However, even if a mandatory requirement for a presentence investigation is not approved by a majority of this Court, defense counsel's requests for a presentence investigation should have been granted on equal protection, due process, and cruel and unusual punishment grounds.

The defendant, an indigent, was represented at trial by court-appointed counsel who was unable to conduct a sufficient investigation into the defendant's background:

> [Defense counsel]: We have not pursued his background, or an investigation into his background to such an extent that we can say with any degree of certainty that a PSI would not benefit him or benefit the Court, either way, in some small way, no matter how small that degree might be, it certainly couldn't harm, and I just really don't see the objection.

(R. 1091).

Obviously, had the defendant been monied, he would have had the financial means to have conducted an investigation into his background. Such a discrimination against indigent persons cannot withstand constitutional scrutiny under the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the cruel and unusual punishment proscription of the Eighth Amendment to the Constitution of the United States. Proffitt v. Florida, supra; Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); Shuman v. State,

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13 In the opinion filed in this case, this Court concluded that Rule 3.710, Fla.R.Crim.P. and the interpretation of the rule in Thompson v. State, 328 So.2d 1 (Fla. 1976) justify the denial of presentence investigations in capital cases. However, since a state procedural rule cannot interfere with a defendant's right to defend against the state's charges, Chambers v. Mississippi, 410 U.S. 284 (1973), it follows that Rule 3.710 cannot interfere with a defendant's fundamental right to defend against the state's desire to impose death and a defendant's right to adduce non-statutory mitigating and enumerated mitigating circumstances. "[W]hen a state procedural rule comes into conflict with a fundamental constitutional right it is clear that the state rule must yield." Braswell v. Wainwright, 463 F.2d 1148, 1154 (5th Cir. 1972). Accordingly, Rule 3.710 must yield.

358 So.2d 1333 (Fla. 1978). This discrimination also deprived the defendant of his rights to access to the courts, see Bounds v. Smith, 430 U.S. 817 (1977), and effective assistance of counsel. See United States v. Pinkney, 551 F.2d 1241, 1248-1251 (D.C. Cir. 1976).

The denial of the defendant's request for a presentence investigation in this case also interferes with the defendant's right to "proportionality review." In Proffitt v. Florida, supra, the Supreme Court of the United States stressed this Court's obligation to enforce this right:

> Under Florida's capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. Moreover, their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances.

428 U.S. at 252.

This "proportionality review," that is, review by this Court of its decisions to ensure proportionality of death sentences imposed, cannot result in even-handed justice if some defendants are afforded investigative means and others are arbitrarily denied them. This practice can only result in the arbitrary and capricious imposition of death in violation of Furman v. Georgia, 408 U.S. 238 (1972), as this Court recognized in State v. Dixon, 283 So.2d 1, 10 (Fla. 1973):

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.

In approving Florida's death penalty statute, the Supreme Court of the United States viewed this Court's proportionality review as a protection "designed to assure that the death penalty will

not be imposed on a capriciously selected group of convicted defendants." Proffitt v. Florida, 428 U.S. at 258 (1976). This protection can not be provided the defendant where he was denied the means to present individualized sentencing information due to his indigency.

That presentence investigations are excellent sources of information relevant to the mitigating circumstances has been recognized by this Court and the Supreme Court of the United States. Gardner v. Florida, 430 U.S. 349 (1977); Proffitt v. Florida, 428 U.S. at 252, n. 9; Gregg v. Georgia, 428 U.S. at 189, n. 37; Hargrave v. State, slip opinion at 11-13 (Hatchett, J., dissenting); Gibson v. State, 351 So.2d 948, 950 (Fla. 1977); Swan v. State, 322 So.2d 485, 488-489 (Fla. 1975); Songer v. State, 322 So.2d 481, 484 (Fla. 1975).

Section 921.231, Florida Statutes, which governs the contents of presentence investigation reports, evidences their relevance to statutory and non-statutory mitigating circumstances:

> 921.231. Presentence investigation reports -- (1) Any Circuit Court of the state, when the defendant in a criminal felony case has been found guilty or has entered a plea of nolo contendere or guilty, shall, and in misdemeanor cases in its discretion may, refer the case to the Department of Offender Rehabilitation for investigation and recommendation. It shall be the duty of the department to make a report in writing to the Circuit Court at a specified time prior to sentencing, depending upon the circumstances of the offender and the offenses. Said report shall include:
>
> (a) A complete description of the situation surrounding the criminal activity with which the offender has been charged, including a synopsis of the trial transcript, if one has been made, and, at the offender's discretion, his version and explanation of the act.
>
> (b) The offender's educational background.
>
> (c) The offender's employment background, including any military record, his present employment status, and his occupational capabilities.
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> (d) The social history of the offender, including his family relationships, marital status, interests, and related activities.

(e) The residence history of the offender.

(f) The offender's medical history and, as appropriate, a psychological or psychiatric evaluation.

(g) Information about the environments to which the offender might return or to which he could be sent should a sentence of nonincarceration or community supervision be imposed by the court.

(h) Information about any resources available to assist the offender, such as:

1. Treatment centers.
2. Residential facilities.
3. Vocational training programs.
4. Special education programs.
5. Services that may preclude or supplement commitment to the department.

(i) The views of the person preparing the report as to the offender's motivations and ambitions and an assessment of the offender's explanations for his criminal activity.

(j) An explanation of the offender's criminal record, if any, including his version and explanation of any previous offenses.

(k) A recommendation as to disposition by the court. It shall be the duty of the department to make a written determination as to the reasons for its recommendation. The department shall include an evaluation of the following factors:

1. The appropriateness or inappropriateness of community facilities, programs, or services for treatment or supervision.
2. The ability or inability of the department to provide an adequate level of supervison for the offender in the community and a statement of what constitutes an adequate level of supervision.
3. The existence of other treatment modalities which the offender could use but which do not exist at present in the community.

(2) In those instances in which a presentence investigation report has been previously compiled, the department may elect to complete a short-form report updating the above information.

(3) All information in the presentence investigation report should be factually presented and verified if reasonably possible by the preparer of the report. On examination at the sentencing hearing, the preparer of the report, if challenged on the issue of verification, shall bear the burden of explaining why it was not possible to verify the challenged information.

(4) The nonconfidential portion of the presentence investigation shall constitute the basic classification and evaluation document of the Department of Offender

> Rehabilitation and shall contain a recommendation to the court on the treatment program most appropriate to the diagnosed needs of the offender, based upon the offender's custody classification, rehabilitative requirements, and the utilization of treatment resources in proximity to the offender's home environment.

In its opinion in this case, this Court held that the denial of the request for the presentence investigation was not prejudicial to the defendant because "[t]he trial court did not find as an aggravating circumstance that appellant had previously been convicted of another capital felony or of a felony involving the use or threat of violence to another person." Slip opinion at 6. This conclusion can neither be reconciled with the broad-based contents of presentence investigation reports under § 921.231, nor the United States Supreme Court decisions in Gardner, Proffitt, and Gregg, nor this Court's decisions in Gibson, Swan and Songer.[14]

Additionally, the prosecutor's argument in opposition to the defendant's request for a presentence investigation report, which the trial court accepted, was meritless:

> [Prosecutor]: Judge, just briefly, I feel that a presentence investigation, if it were going to touch upon the criteria listed in the statute, might be of some relevance. However, it does not.
>
> The Court, I believe, is bound by the criteria outlined in the statute as to the aggravating and mitigating circumstances, and that has already been brought out before the Court and the jury, and a presentence investigation would not cover those items again, and since those are the only items which are to be considered in the passage of sentence, that is my feeling for believing that the presentence investigation would not serve any purpose, because I don't believe the Court can go outside of those criteria.

(R.1090).

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[14] Indeed, this Court's conclusion only recognizes subparagraph (1)(j) of § 921.231, totally ignoring the multitude of additional information which the statute requires to be included in presentence investigation reports.

Under Lockett, the prosecutor's argument fails since the scope of evidence in mitigation is not limited by those criteria listed in the statute.

Thus, the unconstitutional application of Florida's death penalty statute in violation of Lockett v. Ohio, supra, served not only to deprive the jury and judge of consideration of non-statutory mitigating circumstances, as previously noted, but also served to deprive the indigent defendant of a vital means of effectuating the right to adduce non-statutory mitigating circumstances.

The defendant is thereby entitled to a new sentencing hearing with the benefit of a presentence investigation.

VIII.

THE DEFENDANT'S MENTAL ILLNESS MANDATES REVERSAL OF THE DEATH SENTENCE PURSUANT TO HUCKABY V. STATE, 343 So.2d 29 (Fla. 1977)

In Huckaby, supra, this Court ordered the reduction of the defendant's death sentence to life even though the trial judge had found two applicable aggravating circumstances and no mitigating circumstances. The basis for reversal was the causal connection between the defendant's mental illness and the heinous crime he committed:

> There was almost total agreement on Huckaby's mental illness and its controlling influence on him. Although the defense was unable to prove legal insanity, it amply showed that Huckaby's mental illness was a motivating factor in the commission of the crimes for which he was convicted.

343 So.2d at 39.

In the case at bar, two court-appointed experts examined the defendant. One concluded that the defendant probably had brain damage (R. 1000), that the psychological tests revealed that the defendant could not respond normally to day to day situations (R. 1006-7), that the defendant's

ability to deal with life was impaired (R. 1007), and that the defendant's abnormal mind was directly responsible for his inability to conform his conduct to the law. (R. 1010).

The other court-appointed expert concluded that the defendant suffered from mental disturbances which could have resulted from his extensive drug usage (R. 1046), and that the defendant's psychological illnesses caused him to "do things without thinking about them, without reasoning." (R. 1047).

Thus, as in Huckaby: (1) the experts agreed on Hargrave's mental illness; (2) although the defense was unable to prove legal insanity, it amply showed that Hargrave's mental illness was a motivating factor in the commission of the crime; (3) there was a causal connection between the mitigating and aggravating circumstances since, assuming the crime to have been heinous or atrocious or cruel, the nature of the commission of the crime was a direct consequence of the defendant's mental illness.

The trial judge's rejection of Hargrave's mental illness is no different than the trial judge's failure to consider Huckaby's mental illness. The same reasons that compelled this Court to reduce Huckaby's sentence to life mandate reduction of Hargrave's sentence to life. In fact, Hargrave's case is more compelling than Huckaby's since two additional mitigating circumstances were established to the satisfaction of the trial court: the defendant's age and lack of prior criminal activity. In Huckaby, the trial judge found no mitigating circumstances.

Obviously, this case meets both prongs of the test announced in the Hargrave opinion for reversing a death recommendation and sentence:

> [T]his Court's role is not and should not be to cast aside that careful deliberation which the matter of sentence has already received by the jury and the trial judge, unless there has been a material departure by either of

them from their proper functions prescribed by Section 921.141, Florida Statutes (1975), or unless it appears that in view of other decisions concerning imposition of the death penalty the punishment is too great.

Slip opinion at 6.

The trial judge materially departed from his proper function, as did the trial judge in Huckaby, by rejecting the evidence of mental illness; and in view of other decisions, particularly Huckaby, the death penalty is too great.

IX.

DEFENSE COUNSEL WAS IMPROPERLY DENIED CLOSING ARGUMENT TO THE JURY AT THE ADVISORY SENTENCING PROCEEDING.

Defense counsel objected to the closing argument procedure adopted by the trial court at the advisory sentencing hearing. The court penalized the defense for putting on testimony of the defendant's mother by allowing, as a result of the testimony, the state to present two closing arguments to the jury and placing defense counsel's argument between the two. (R. 1023, 1028). Defense counsel had suggested, as is now embodied in Rule 3.780(c), Fla.R.Crim.P., that each side be given one argument with the state presenting the first argument. (R. 1025). The denial of defense counsel's request was error.

X.

THE DEFENDANT IS ENTITLED TO A NEW TRIAL SINCE A CROSS-SECTION OF THE COMMUNITY WAS EXCLUDED FROM THE JURY VENIRE.

The defendant renews herein the arguments presented in paragraphs 2-6 in the Motion to Withdraw Opinion and for Leave to File Brief.

XI.

THE DEFENDANT IS ENTITLED TO APPELLATE REVIEW BY SEVEN JUSTICES.

The defendant renews herein the argument presented in paragraph 8 of the Motion to Withdraw Opinion and for Leave to File Brief.

WHEREFORE, for the above reasons, the appellant requests that rehearing be granted in this cause.

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Rehearing was mailed to the Office of the Attorney General, The Capitol, Tallahassee, Florida 32304, this 4th day of August, 1978.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1351 Northwest 12th Street
Miami, Florida 33125

By: Paul Morris
PAUL MORRIS
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

LENSON HARGRAVE,	:	
Appellant,	:	
vs.	:	CASE NO. 48,135
STATE OF FLORIDA,	:	CIRCUIT COURT NO. 75-118A
Appellee.	:	

: : : : : : : : : : : : : : : : : :

MOTION TO STRIKE PETITIONER'S

PETITION FOR REHEARING

COMES NOW Respondent, State of Florida, by and through its undersigned counsel and files this its motion to strike Petitioner's petition for rehearing in that it violates Fla.R. App.P. 6.17, 3.14 and the new Fla.R.App.P. 9.330, and as grounds would show:

1. Three issues were raised by Petitioner in his main brief and addressed by this Court in its rendition dated June 30, 1978. Specifically,

> "(I) Whether the imposition and execution of the sentence of death under Section 921.141, Florida Statutes (1975), constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution;
>
> (II) Whether the trial court erred in sentencing the defendant without the benefit of a presentence investigation report as requested by defense counsel; and
>
> (III) Whether the trial court erred in imposing the death penalty."(Slip opinion 5)

Fla.R.App.P. 3.14(b) states:

> "Contents of Petition. The petition for rehearing shall not assume a new ground or

position from that taken in the original arguments or briefs upon which the cause was submitted, and must be set forth concisely, and without argument, the alleged omissions, oversights, causes or grounds on which it is based."

Pursuant to Fla.R.App.P. 9.330(a) for rehearing under the new appellate rules, said rule states in part:

"* * * The motion shall state with particularity the points of law or fact which the court has overlooked or misapprehended. The motion shall not re-argue the merits of the court's order."

A cursory review of Petitioner's petition reveals that he has failed to comply with any and all requirements of the rehearing rules. Said petition is twenty-one pages long and argues new issues not previously raised or takes a new position from the position originally taken. See Points V, VI, VIII, IX, X, and XI. In regard to Points I, II, III, IV, and VII, Petitioner's petition fails to set forth "concisely, and without argument, the alleged omissions, oversights, causes or grounds on which it is based."

In Williams v. State, 113 So.2d 833 (Fla. 1959) this Court opined:

"Because of a palpable and egregious violation of Florida Appellate Rule 3.14 subd, b, 31 F.S.A. providing that petitions for rehearing 'must set forth concisely, and without argument, the alleged omissions, oversights, causes or grounds on which it is based and pursuant to Florida Appellate Rule 3.14, subd. d providing for the striking of such petition for a substantial violation of any material provision of the rule,

It is ordered that said petition be and the same is hereby striken."

As the Third District Court held in Sherwood v. State, 111 So.2d 96 (Fla. 3d DCA 1959) and quoting from the First District Court's opinion in State ex rel. Joytex Realty Company v. Green, 105 So.2d 817 (Fla. 1 DCA 1958):

"The sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent or rule of law which the court has overlooked in rendering its decision. Judges are human and

> subject to the frailties of humans. It follows that there will be occasions when a fact, a controlling decision or a principle of law even though discussed in the brief or pointed out in oral argument will be inadvertently overlooked in rendering the judgment of the court. There may also be occasions when a pertinent decision of the Supreme Court or of another District Court of Appeal may be rendered after the preparation of briefs, and even after oral argument, and not considered by the court. It is to meet these situations that the rules provide for petitions for rehearing as an orderly means of directing the court's attention to its inadvertence.
>
> It is not a compliment to the intelligence, the competency or the industry of the court for it to be told in each case which it decides that it has 'overlooked and failed to consider' from three to twenty matters which, had they been given proper weight, would have necessitated a different decision.
>
> Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation." 111 So.2d at 97-98

The court noted several violations of the rule pertaining to rehearing petitions, to-wit: "* * * (1) the inclusion in the petition of a written argument with supporting citations, (2) arguing or quarreling with the court over correctness of its conclusions on the points it has considered and decided, (3) advancing new or other points or theories not previously relied on, and (4) rearguing the cause in advance of a permit from the court for such reargument.* * *." 111 So.2d at 99, and finding the petition before it in violation of the rule ordered the petition for rehearing striken.

Further this Court in English v. State, 31 Fla. 356, 12 So. 689 (Fla. 1839) and State ex rel. Russell v. Barnes, 25 Fla. 86, 5 So. 703 (Fla. 1889) concluded that rehearing should not be granted where the questions that the petition alleges to have been omitted from the consideration of the court were necessarily involved in and determined by the decision, though not in express terms in the rendition.

Respondent would respectfully submit that the briefs in this cause were filed in February 1976 and the final rendition by this Court issued June 30, 1978. Obviously, the court took under consideration all those decisions rendered by the court during the pendency of Petitioner's appeal which were applicable to the issues raised and within the scope of the court's jurisdiction. See this Court's slip opinion dated June 30, 1978.

WHEREFORE, Respondent moves this Court to strike the petition for rehearing or in the alternative strike the petition and allow Petitioner leave to file a proper petition for rehearing in compliance with the aforementioned appellate rules.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

By _____
CAROLYN M. SNURKOWSKI
Assistant Attorney General

THE CAPITOL
Tallahassee, FL 32304
904 488 0290

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I certify that a true copy hereof has been furnished Honorable Bennett Brummer, Public Defender, Eleventh Judicial Circuit, 1351 N.W. 12th Street, Dade County Justice Building, Miami, FL 33125, via Mail, this 10th day of August, 1978.

_____
CAROLYN M. SNURKOWSKI
Assistant Attorney General

OF COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

TUESDAY, FEBRUARY 6, 1979

LENSON HARGRAVE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 48,135

Circuit Court Case No. 75-118A

Upon consideration of Petition for Rehearing filed by attorney for Appellant,

IT IS ORDERED by the Court that said Petition be and the same is hereby denied. Appellee's Motion to Strike is thereby moot.

ENGLAND, C.J., ADKINS, OVERTON, SUNDBERG and ALDERMAN, JJ., concur
BOYD and HATCHETT, JJ., dissent

Motion to Withdraw Opinion and for Leave to File Brief filed by attorney for Appellant is hereby denied.

ENGLAND, C.J., ADKINS, BOYD, OVERTON, SUNDBERG, HATCHETT and ALDERMAN, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

TC
cc: Hon. Gene Williams, Judge
Hon. Richard P. Brinker,

Paul Morris, Esquire
Carolyn M. Snurkowski, Es

IN THE CIRCUI COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

CASE NO: 75-118A (Judge Tanksley)

THE STATE OF FLORIDA,)
Plaintiff,)
vs.) MOTION TO VACATE JUDGMENT AND SENTENCE
LENSON A. HARGRAVE,)
Defendant.)

The defendant, Lenson A. Hargrave, by and through undersigned counsel, moves this Court to vacate the judgment and death sentence in the above-styled cause, pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure, on the grounds that said judgment and sentence are violative of the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 2, 9, 16, and 17 of the Constitution of the State of Florida.

THE FACTS

Defendant was charged by indictment filed January 9, 1975 with first-degree murder.[1] He was tried on July 10-11 and 14-15. The evidence adduced at trial, based entirely upon the statements of defendant, established that defendant, on May 19, 1974, entered a convenience store in Miami, intending to commit a robbery. The clerk was unable to open the cash register. Defendant shot him, attempted unsuccessfully to open the register, and then shot the clerk a second time. Defendant was arrested approximately seven

[1] Defendant was represented in initial Circuit Court proceedings by Assistant Public Defenders Linnea R. Snyder and Stephen I. Mechanic. The Public Defender was discharged as counsel prior to trial, and defendant was represented at trial by Douglas Williams and Michael Tarre as court-appointed counsel. Defendant was represented on direct appeal and in certiorari proceedings in the Supreme Court of the United States by Assistant Public Defender Paul Morris. Defendant is being represented in post-trial proceedings by current counsel.

months after the homicide, and subsequently confessed to his participation in the offense. The evidence adduced at trial further established that the robbery had been instigated and planned by Lawrence Karge, the co-defendant in this case.[2]

The jury returned a guilty verdict on July 15, 1975 and subsequently returned an advisory sentence recommending the imposition of the death sentence. On July 18, 1975, the court imposed a sentence of death, finding four aggravating circumstances applicable: that the homicide was committed during the course of an attempted robbery; that the homicide was committed for the purpose of avoiding arrest; that the homicide was committed for pecuniary gain; and that the homicide was especially heinous, atrocious and cruel. The court found as mitigating circumstances that defendant had no significant history of criminal activity and his age at the time of the crime (just short of his 19th birthday); the court, while noting that the evidence adduced at the sentencing hearing established "that the defendant has a history of some mental abnormalities which may yet be affecting (him)" and that "there could be some doubt as to whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired to some degree", rejected these factors as mitigating circumstances.

A timely appeal was taken from the judgment and sentence to the Supreme Court of Florida. The Court issued its decision on June 30, 1978 and denied a timely filed petition for rehearing on February 6, 1979. A petition for writ of certiorari was subsequently filed in the Supreme Court of the United States: the petition was denied on October 15, 1979 and a timely filed petition for rehearing was denied on December 3, 1979.

The Florida Cabinet, sitting as the Board of Executive Clemency, heard clemency arguments on September 12, 1980. The

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[2] The facts in this motion are excerpted from the opinion of the Supreme Court of Florida in this case, which is reported at 366 So.2d 1 and is included in the attached appendix.

Governor signed a death warrant for defendant on September 17, 1980; execution is scheduled for October 8, 1980 at 8:30 A.M.. No prior post-conviction motions have been filed in this cause.

GROUNDS FOR RELIEF

I

THE PROSECUTOR AND THE TRIAL COURT IMPROPERLY COMMENTED UPON THE SILENCE OF DEFENDANT AT TRIAL, IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, ARTICLE I, SECTION 9 OF THE CONSTITUTION OF THE STATE OF FLORIDA, AND RULE 3.250 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE.

Comments which infringed upon the absolute right of defendant to remain silent at trial occurred at several points during the course of the trial proceedings:

1) voir dire: During jury selection, counsel for defendant inquired of the jurors regarding their ability to fairly try the case if defendant did not testify (R. 360-63).[3] One juror stated his opinion that an accused should testify (R. 362-63), and counsel for defendant requested an excusal for cause (R. 363). The prosecutor requested and was granted an opportunity to question the juror (R. 363-64), and the following then transpired:

> Mr. Goldstein (Assistant State Attorney): Mr. Tucker, we can all understand that you might want to hear something from the defendant. Maybe you will hear the State's evidence and you might feel in your own mind, "Well, I would like to hear what the defendant has to say about that." Okay. We can understand that, but the court is going to --
>
> Mr. Tarry (Co-counsel for defendant): Excuse me. I must object to that comment, because I don't believe I could understand that.
>
> Mr. Goldstein: I believe I said --
>
> Mr. Tarry: I would strenuously object.
>
> The Court: Sustained. The jury will disregard the last statement of the prosecutor.
>
> Mr. Tarry: And I would reserve my right to make certain motions later on.
>
> Mr. Goldstein: You might feel at the close of the case that you would want the defendant to

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[3] Relevant excerpts from the trial transcript are included in the second portion of the appendix to this motion. Page references are to the original pagination.

> make some statement; however, i. the judge tells you at the close of the case that the defendant does not have to say anything, he does not have to take the stand, and if the judge-- (R. 364-65).

Counsel renewed his objection and moved for a mistrial (R. 365-66). The prosecutor responded that he had merely been referring to the instruction which the court would give on this matter (R. 366). The court properly noted that the instruction on an accused not testifying is only given, under Florida law, if the accused requests it, and counsel for defendant stated that it had not been his intention to do so (R. 366).[4] The court stated that it was "going to try to cure it" (R. 368), and over objection of counsel instructed the jurors that the burden remained upon the prosecution to prove defendant guilty (R. 369-72). The juror in question, Mr. Tucker, then responded:

> . . . If the defendant is going to sit there in living image and not say anything, well, (it) don't seem like a trial. He is guilty from -- (R. 373).

Counsel renewed the motion for mistrial and requested the court to strike the jury panel (R. 374-75). The motion was denied (R. 376-77). The court then excused the particular juror, stating, "I wish now that I had granted the motion then instead of going to try and make it better and let the prosecutor go into it." (R. 378).

2) trial proceedings: During redirect examination of Terry Morton, a prosecution witness who had testified to inculpatory statements of defendant prior to his arrest, the prosecutor inquired regarding the statements of defendant, and counsel for defendant objected on the ground that this subject had not been covered on cross-examination (R. 737). The prosecutor responded, "This is an area Lenson Hargrave ***brought up." (R. 737). Counsel for defendant moved for a mistrial (R. 738-39). The prosecutor stated in response that he had been referring to the statements of defendant (R. 739-40). The motion for mistrial was denied (R. 740).

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[4] The instruction was not requested and was not given by the court.

3) comments by the court: During his cross-examination of Detective Major, the lead investigator, counsel for defendant sought to establish that criminal charges against Terry Morton had been held in abeyance pending his trial testimony (R. 798). Objections to this questioning were sustained (R. 798-800). Counsel then inquired regarding the personal knowledge of the officer, and the following transpired:

> Q. Do you know it to be a fact, Detective Major, that as of May of 1975, there had been a delay in the disposing of criminal charges against --
> Mr. Goldstein: Objection, Your Honor.
> Mr. Williams (Co-counsel for defendant): I'm asking for his factual knowledge.
> Mr. Goldstein: There is any number of reasons why cases get tried and do not get tried and get delayed.
> Mr. Williams: I would be happy to have it explained.
>
> * * *
>
> The Court: These are things you can show through your own witnesses, really. (R. 800-01).

Counsel objected to this comment and reserved his right to move for a mistrial (R. 801). He subsequently moved for a mistrial (R. 841). The court responded that its comment had been that "if you want to bring all these things out, you're going to have to call witnesses", and denied the motion (R. 842).

4) closing argument: In his closing argument, the prosecutor made reference to the opening statement of counsel for defendant, and argued that counsel had represented that certain facts would be adduced; he stated that these facts had not been established (R. 926). He continued this argument:

> It is true that you are not permitted to go outside the evidence that you heard, except to the extent that you are to apply your common sense in interpreting this evidence, but you are not to go outside this evidence and speculate as to what other people might know or why didn't we hear from those people, and what would they have said had they been called.
> You're not permitted to do that.
> I might remind you, at this time, Mr. Williams has the same subpoena power the State has. (R. 927-28).

Counsel objected to this comment and reserved his right to move for a mistrial (R. 928). A subsequent motion for mistrial was

denied by the court (R 948-49).

It is fundamental that comments upon the silence of an accused at trial, either from the prosecution or the court, violate the Fifth Amendment privilege against self-incrimination. Chapman v. California, 386 U.S. 18 (1967); Griffin v. California, 380 U.S. 609 (1965). "(I)t is the fact of comment rather than the source of comment that effects denial of the right to remain silent." Sublette v. State, 365 So.2d 775, 778 (Fla. 3d DCA 1978). In Florida, such comment is prohibited, whether it be direct or indirect, and any comment which may be interpreted as referring to the silence of an accused is improper regardless of the intent with which it was made and regardless of the susceptibility of the comment to a different construction. See, e.g. Trafficante v. State, 92 So.2d 811, 814 (Fla. 1957); Smith v. State, 344 So.2d 915, 920 (Fla. 1st DCA 1977); Mathis v. State, 267 So.2d 846, 848 (Fla. 4th DCA 1972); Jones v. State, 260 So.2d 279, 281 (Fla. 3d DCA 1972). A comment which can be interpreted as a reference to the silence of an accused is improper even if it was "innocently or inadvertently made" and regardless of "whether any harm was actually intended." Singleton v. State, 183 So.2d 245, 251 (Fla. 2d DCA 1966). Thus, comments by a prosecutor which, on their face, appear to be neutral recitations of the right of an accused to remain silent or to the subpoena power enjoyed by an accused, or comments on the right of an accused to produce witnesses, are forbidden. See, e.g. Carter v. State, 199 So.2d 324 (Fla. 2d DCA 1967); Tolliver v. State, 133 So.2d 565 (Fla. 3d DCA 1961).

Such comments are per se prejudicial, are not subject to the harmless error doctrine, and cannot be remedied by curative instructions. See David v. State, 369 So.2d 943 (Fla. 1979); Shannon v. State 335 So.2d 5 (Fla. 1976); Way v. State, 67 So.2d 321 (Fla. 1953); Smith v. State, 358 So.2d 1137 (Fla. 3d DCA 1978); Kembro v. State, 346 So.2d 1083 (Fla. 1st DCA 1977); Young v. State, 280 So.2d 12 (Fla. 2d DCA 1973).

II

THE APPLICATION OF THE DEATH PENALTY TO DEFENDANT VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. Consideration Of All Relavant Mitigating Circumstances Was Limited At Trial And On Appeal, In Violation Of The Fifth, Sixth, Eighth And Fourteenth Amendments.[5]

The Eighth Amendment "calls for a greater degree of reliability" in the determination of whether death is an appropriate penalty than is required in other criminal proceedings. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 2964 (1978). Accord Gardner v. Florida, 430 U.S. 349 (1977); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). It thus commands an "individualized decision" to impose death, Lockett v. Ohio, supra at 2965, which contemplates a "character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977). The sentencing process must provide for full consideration of the "character and record of the individual offender", and allow for full consideration of "whatever mitigating circumstances may be relevant" to that person. Lockett v. Ohio, supra at 2963. See also Roberts v. Louisiana, 431 U.S. 633, 637 (1977); Woodson v. North Carolina, supra at 304.

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5 In Songer v. State, 365 So.2d 696, 700 (Fla. 1978), the first post-Lockett decision of the Supreme Court of Florida to address the Lockett issue, the Court held that the statutory roster of mitigating circumstances is not and never was exclusive. See n. 6, infra. In 1979, Section 921.141 was amended by the Legislature to provide for the admissibility of "any matter the court deems relevant to the nature of the crime and the character of the defendant"; the amended statute moreove deletes the references to the mitigating factors "as enumerated". The legislative history of the amendment, Ch. 79-353, Laws of Florida, est lishes that it was intended to bring Section 921.141 into line with th rule announced in Lockett v. Ohio, 438 U.S. 586 (1978). Songer is in irreconcilable conflict with this legislative history and intent, whic establishes that the legislature intended the pre-1979 statute to be limited to the specific mitigating circumstances.

Thus, the sentencing statute and procedure under which defendant was sentenced was unconstitutional under Lockett. However, in light of Songer, which is binding on this Court, defendant will not advance further argument in this regard before this Court. Defendant does no waive the unconstitutionality of the statute and procedure under whic he was sentenced, nor does defendant waive any contentions that capit punishment is per se violative of the Eighth and Fourteenth Amendment and that Section 921.141 is facially unconstitutional.

Lockett establishes that the Eighth Amendment requirement of individualized sentencing is satisfied only if all possible mitigating circumstances may be brought before the sentencing authority; thus, a sentencing scheme which "prevents the sentencer from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation" is unconstitutional. 98 S.Ct. at 2965. While Section 921.141(6) is limited to specific mitigating circumstances, Songer v. State, 365 So.2d 696, 700 (Fla. 1978) establishes that this list is not exclusive and that "all relevant circumstances may be considered in mitigation." Were this not so, of course, the statute would fall under Lockett.

While the mitigating evidence under the Florida scheme may not be limited to the factors set forth in the statute, defendant in this case was deprived of an opportunity to present and have considered all relevant mitigating circumstances. This renders the death penalty unconstitutional as applied to defendant, and the death sentence imposed upon him unlawful.

Not once, but several times during the course of the advisory sentence hearing, the jury was advised that the mitigating circumstances which it could consider were limited. At the outset of the hearing, the court instructed the jury:

> During the hearing, you will receive evidence and testimony concerning aggravating or mitigating circumstances. (R. 982).

During the closing argument of the prosecutor, it was again stressed that "certain criteria have been devised" to guide the jury (R. 1058), and the prosecutor prefaced a reading of the statutory mitigating circumstances by telling the jury that it was "going to be instructed as to certain mitigating circumstances that you should look for . . . (R. 1061). The prosecutor then read the statutory roster (R. 1061-64)

Furthermore, the record establishes that all of the parties to this trial believed the mitigating circumstances to be limited to those specified in Section 921.141(6), Florida Statutes (1977). At the close of the advisory sentence proceeding, counsel for defendant requested the court to order a presentence investigation; in stating

its belief that defendant was not entitled to a presentence investigation, the court noted:

> But there is very little, if any of the ordinary presentence report that would be relevant to what the jury and the Court are supposed to consider in this matter concerning mitigating and aggravating circumstances. (R. 1082).

At a subsequent hearing regarding the claim of defendant that a presentence report was required, the prosecutor voiced the same response:

> Mr. Goldstein: Judge, just briefly, I feel that a presentence investigation, if it were going to touch upon the criteria listed in the statute, might be of some relevance. However, it does not.
>
> The Court, I believe, is bound by the criteria outlined in the statute as to the aggravating and mitigating circumstances, and that has already been brought out before the Court and the jury, and a presentence investigation would not cover those items again, and since those are the only items which are to be considered in the passage of sentence, that is my feeling for believeing (sic) that the presentence investigation would not serve any purpose, because I don't believe the Court can go outside of those criteria. (R. 1090).

Counsel for defendant never challenged this position -- indeed, he seemed to affirmatively accept it -- and the court expressly accepted it in denying the motion for a presentence investigation (R. 1090-92).[6]

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[6] There was no express and absolute principle of Florida law at the time of this trial which governed the admissibility of non-statutory mitigating circumstances. However, the statute itself, listing a specific roster of mitigating circumstances, certainly indicated a limitation to those circumstances. And the Supreme Court, in State v. Dixon, 283 So.2d 1, 8-9 (Fla. 1973), also used limitative language in analyzing potential mitigating circumstances:

> The most important safeguard presented in Fla.Stat. §921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed. . . .
>
> * * *
>
> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla.Stat. §921.141(7), F.S.A. . . . .

See also Alford v. State, 307 So.2d 433, 444 (Fla. 1975). The Court arguably so held in Cooper v. State, 336 So.2d 1133 (Fla. 1976). However, Songer v. State, supra teaches that Cooper did not so hold, and that the mitigating circumstances were never limited to those specified in the statute. 365 So.2d at 700. Accordingly, the blind acquiescence of counsel for defendant in a clearly erroneous interpretation of the law by the court and the prosecutor -- to the undeniable detriment of his client -- constitutes ineffective assistance of counsel. It is fundamental that "the delivery of effective assistance requires the attorney involved to make a reasonable investigation into the facts

Moreover, even if defendant had been permitted to have presented, see n. 6, supra, relevant non-statutory mitigating evidence, the sentencing proceeding in this case would remain constitutionally infirm due to the absence of proper instructions to the jury. As Lockett clearly establishes, merely providing the sentencing authority with relevant information is not sufficient if it cannot be appropriately considered in mitigation of the penalty. 98 S.Ct. at 2959, 2965-67. "[T]he provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment by a sentencing jury; rather, the jury must be given proper instructions to guide it in utilizing this information. Gregg v. Georgia, 428 U.S. 153, 192-95 (1976). Lockett mandates that "the judge clearly instruct the jury about mitigating circumstances and the option to recommend against death." Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1978). The absence of such instructions -- and the presence of instructions that the mitigating circumstances were limited -- renders the death-sentencing procedure in this case violative of the Eighth Amendment.

The same limitations pervade the sentencing order. In

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6 cont.
of the case and to acquaint himself with the law pertinent to the facts." Nelson v. State, 274 So.2d 256, 258 (Fla. 4th DCA 1973). Counsel must be familiar with controlling legal principles and be a "reasonably competent legal historian". Cooks v. United States, 461 F.2d 530, 532 (5th Cir. 1972). The failure of counsel to do so renders his representation ineffective.

Moreover, counsel himself admitted, at the hearing on the request for a presentence investigation that insufficient preparation had been done for the death phase of the trial:

> We have not pursued his background, or an investigation into his background to such an extent that we can say with any degree of certainty that a PSI would not benefit him or benefit the Court, either way, in some small way, no matter how small that degree may be. . . . . (R. 1091).

Thus, even if counsel had persuaded the court to allow the presentation of non-statutory mitigating circumstances and to instruct the jury to consider such evidence, the insufficient investigation into the character and background of defendant would have prohibited the full expostulation contemplated under a constitutional death penalty structure. Accordingly, the limitative rulings of the trial court and the ineffective assistance rendered defendant by his counsel deprived him of both the means and the opportunity to present the jury and the court with evidence of "whatever mitigating circumstances may (have been) relevant" -- an absolute prerequisite to a constitutionally tolerable imposition of the death penalty. Lockett v. Ohio, supra at 2963.

rejecting the applicability of two statutory mitigating circumstances, Section 921.141(6)(b) and (f), the court noted that some level of mitigating evidence had been introduced, but totally discounted it:

> That although there is some evidence of a personality defect in the defendant and some possibility of an impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the Court finds that such capacity was not substantially impaired.

Thus, the court recognized that defendant was in fact impaired, but gave this fact no weight because it failed to satisfy the statutory mitigating circumstances.

And the Supreme Court, in upholding the death sentence, similarly limited its consideration of possible mitigating circumstances:

> Returning to appellant's argument that the trial judge erred in failing to find the mitigating circumstances delineated above, we respond that the jury and the judge could have resolved the evidence in favor of appellant's position, but neither was compelled to do so. . . . Appellant simply disagrees with the force and effect given to the testimony of a psychologist and a psychiatrist at the sentencing hearing. . . . It is apparent, then, that the trial judge did not ignore or fail to consider the psychological evidence bearing on mitigation. Obviously, he and the jury were not persuaded that it provided a sound basis for establishment of the statutory mitigating circumstances. Hargrave v. State, 366 So.2d 1, 6 (Fla. 1978)(original emphasis).

This limited approach by the Supreme Court is of particular significance in light of its rejection of the "doubling up" argument advanced on behalf of defendant, challenging the application by the court of two aggravating circumstances -- felony-murder and a homicide committed for pecuniary gain -- based upon the same facts. The Supreme Court, while recognizing the error, held it harmless because "[a]bsent the circumstance of pecuniary gain, there were ample other statutory aggravating circumstances to place on the scale to weigh against the valid mitigating circumstances." Id. at 5 (emphasis supplied).

Thus, at every level of the trifurcated Florida death penalty structure -- the jury, the trial court, and the Supreme Court -- defendant was denied the means and opportunity to present, and a full consideration of, all relevant mitigating circumstances. That allowin

defendant such an opportunity would have resulted in the presentation of powerful mitigating evidence cannot be questioned. See Proffer included in appendix.[7] Lockett thus requires the conclusion that the entire sentencing process in this case violated the Eighth and Fourteenth Amendments.

B. The Admission Into Evidence Of The Testimony Of A Court-Appointed Psychologist, Who Examined Defendant Prior To Trial To Determine His Competency To Stand Trial, At The Sentencing Hearing Violated The Fifth, Sixth And Fourteenth Amendments.

Prior to trial, the court appointed Dr. Robert W. Sylvester, a clinical psychologist, to examine defendant. The order directs Dr. Sylvester (and two other experts appointed by the court) to report regarding: the "mental condition of the defendant"; the capacity of the defendant to stand trial; the sanity of the defendant at the time of the offense; whether defendant should be afforded psychiatric treatment. Dr. Sylvester examined defendant on February 12, 1975. Defendant was not advised, prior to the examination, that the evidence gleaned therefrom could be introduced at the sentencing phase of the trial and that he had a right to remain silent or could terminate the interview if he so wished.

Dr. Sylvester was presented by the State at the sentencing hearing. He testified, in pertinent part, that: defendant did not suffer from a severe mental or emotional disorder; that defendant was a sociopath with a disregard for the law and for social conventions; and that defendant had been the dominant figure in the offense, rather than the co-defendant Karge (R. 987-98, 1009-10).[8]

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[7] The third section of the appendix is a proffer of the mitigating evidence which could have been presented at trial. It is a copy of a packet submitted to the Florida Cabinet prior to the clemency hearing on September 12, 1980. Included in the packet are three social and psychological evaluations of defendant and his family and additional relevant data. Due to the extreme haste with which a warrant was issued after the clemency hearing, counsel have been unable to provide a more extensive proffer; however, the materials in the proffer provide an excellent example of the type of evidence which could have been presented had defendant been afforded the full sentencing hearing contemplated under Lockett.

[8] The prejudicial effect of this testimony is patent. It was relied upon by this court (and subsequently by the Supreme Court) to reject the applicability of relevant statutory mitigating circumstances.

The admissi . of this testimony viol pd the Fifth and Sixth Amendments. In Smith v. Estelle, 602 F.2d 694, 708-09 (5th Cir. 1979), the Court of Appeals for the Fifth Circuit ruled that an accused in a capital case may not be compelled to be examined by an expert whose testimony will be used by the State in seeking the death penalty, and that the accused must be advised, prior to such an examination, that he/she has the right to remain silent and the right to terminate the examination. See also United States v. Leonard, 609 F.2d 1163 (5th Cir. 1980). The absence of such warnings in this case renders the testimony of Dr. Sylvester inadmissible.

C. The Reliance By The Prosecutor Upon Non-Statutory Aggravating Circumstances Violates The Eighth And Fourteenth Amendments.

Section 921.141(5) specifies certain specific aggravating circumstances which may be considered in the death-sentencing process; non-statutory aggravating circumstances may not be considered in determining whether death is an appropriate sentence. E.g. Mikenas v. State, 367 So.2d 606, 610 (Fla. 1978); Riley v. State, 366 So.2d 19, 21 (Fla. 1978); Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977); Huckaby v. State, 343 So.2d 29, 33 (Fla. 1977); Purdy v. State, 343 So.2d 4, 6 (Fla. 1977); Provence v. State, 337 So.2d 783, 786 (Fla. 1976). "The aggravating circumstances specified in the statute are exclusive, and no others may be used for that purpose." Miller v. State, 373 So.2d 882, 885 (Fla. 1979)(citation omitted).

The prosecutor in this case violated this most basic principle, one of the key protections against the arbitrary and capricious application of death as punishment. Elledge v. State, supra at 1002-03. In his opening argument[9], the prosecutor urged the jury to recommend a death sentence based in part upon the alleged propensity of defendant to commit murder:

> . . . [B]ecause of the fact that Lenson Hargrave has boasted so frequently about his having killed somebody and about his

[9] Since defendant presented evidence at the sentencing hearing, the court allowed the State opening and closing arguments. Contrast Fla.R.Crim.P. 3.780(c).

> being able to kill again without feeling and about being able to kill again, because of all of those things, the State urges you to return a recommendation to this Court of death. (R. 1065).

The evidence upon which this argument was based had been introduced -- ostensibly -- to refute possible mitigating circumstances and not to prove an aggravating circumstance (R. 1029-31).

In his closing argument, the prosecutor reprised this theme, urging the jury to recommend death for the protection of the community:

> . . . .I submit to you that there is only one way that you can tell this Court and the people of this community that there is no place in this society for people who feel like Lenson Hargrave, people who feel that killing another human being senselessly and needlessly and viciously have any place in this society. (R. 1073-74).

The propensity of an individual to commit crimes is simply not an authorized aggravating circumstance and cannot be considered in the death-determination process. Miller v. State, supra at 885; Huckaby v. State, 343 So.2d 29, 33 (Fla. 1977). Remarks calculated to influence the jury by inciting fears for the safety of their community are improper and prejudicial in any criminal trial. See e.g. Sims v. State, 371 So.2d 211 (Fla. 3d DCA 1979); Reed v. State, 333 So.2d 524 (Fla. 1st DCA 1976); Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1968). The effect of such remarks is yet more egregious in a capital case, see Grant v. State, 194 So.2d 612, 614-15 (Fla. 1967), particularly under a statute where limited aggravating circumstances are one of the key factors in the constitutionality of the penalty. State v. Dixon, supra.

D. The Failure Of The Trial Court To Properly Instruct The Jury On The Burden Of Proof At The Sentencing Hearing Violates The Fifth, Eighth And Fourteenth Amendments.

During discussions at the sentencing hearing regarding the burden of proof, the trial court commented, "I don't know if anyone has any burden of proof." (R. 1027). It further stated, "There is no burden of proof on anybody here. It's up to the jury on the whole thing." (R. 1027). At the close of the hearing, the court instructed the jury that aggravating circumstances must be proved beyond a

reasonable doubt. The Court further instructed the jury:

> Your verdict must be based upon your finding of whether sufficient aggravating circumstances exist and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances found to exist. (R. 1074).

The court did not otherwise instruct the jury on the burden of proof.

The ultimate issue in a sentencing determination under Section 921.141 is not whether an aggravating circumstance or circumstances exist, and it is not whether, given such circumstance or circumstances, the mitigating considerations can override the assumption that death is appropriate. Rather, "[n]o defendant can be sentenced to capital punishment unless the aggravating circumstances outweigh the mitigating factors." Alvord v. State, 322 So.2d 533, 540 (Fla. 1975).

For death is not necessarily the proper punishment merely because an aggravating circumstance exists. Application of the death penalty is limited "to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, supra at 7. Thus, mitigating circumstances are not mere affirmative defenses to the imposition of the death penalty -- the overriding of such circumstances is an absolute prerequisite of a valid death sentence. See Lockett v. Ohio, supra; Gregg v. Georgia, 428 U.S. 153, 197 (1976); Alvord v. State, supra. Due process of law therefore requires that the aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt before death may be inflicted. Patterson v. New York, 432 U.S. 197, 215 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975).[10]

Such due process protections are of equal, if not greater

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[10] In Mullaney, the Supreme Court considered a homicide statute under which, once the State established that the killing was intentional, the element of "malice aforethought" was presumed and the accused was guilty of murder, "unless the defendant proves by a fair preponderance of the evidence that it was committed in the heat of passion on sudden provocation, in which case it is punished as manslaughter". 421 U.S. 688, 691-92. The Court held "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." Id. at 704. Mullaney thus forbids "shifting of the burden of persuasion with respect to a fact" which must be proved to support a conviction. Patterson v. New York, supra at 216.

importance in the capital sentencing process. See Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235 (1978); Gardner v. Florida, 430 U.S. 349 (1977). Mullaney is of particular application to the sentencing decision in a capital case inasmuch as the question of whether or not the killing "was committed in heat of passion" did not "come into play until the jury already has determined that the defendant is guilty and may be punished at least for manslaughter." 421 U.S. at 697. The State argued in Mullaney that the question was therefore only relevant to punishment -- not to guilt -- and that the due process requirement of proof beyond a reasonable doubt was therefore inapplicable. Id. at 697-98.

(continued on next page)

The resounding rejection of this argument by the U. S. Supreme Court is of critical significance in this case:

> The safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and that might lead to a significant impairment of personal liberty. The fact remains that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly. Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction established by Maine between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes. 421 U.S. 698.

Certainly, the qualitative difference between life or death in a capital case is "of greater importance than the difference between guilt or innocence for many lesser crimes."

Mullaney thus mandates the conclusion that the State must, in a capital sentencing hearing, establish beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. Florida has declared that it will not execute persons except for "the most aggravated and unmitigated of most serious crimes." State v. Dixon, supra at 7. It cannot place the burden upon the defendant to prove that he or she should not be killed -- Mullaney places the burden squarely upon the State to prove that the defendant should be executed.

Section 921.141 does not affirmatively place a burden of proof upon defendant. The holding of the Court in Alvord v. State, supra clearly establishes that the burden is not to be placed upon the defendant. However, the instructions to the jury in this case could and probably would be interpreted as doing so; this establishes the due process violation. Sandstrom v. Montana, ____U S.____, 99 S.Ct. 2450 (1979); Hammontree v. Phelps, 605 F.2d 1371 (5th Cir. 1979).[11]

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[11] In Sandstrom, the Supreme Court considered a premeditated murder prosecution in which the defense proffered was a lack of specific inten Id. at 2453. The jury in that case was instructed that an individual i presumed to intend the ordinary consequences of his or her acts; this instruction was challenged on the ground that it impermissibly shifted the burden of proof to the defendant. Id. at 2453-54.

The Supreme Court held that "the jury may have interpreted the instruction as a direction to find intent upon the proof of the defendant's voluntary actions (and their 'ordinary' consequences), unless the defendant proved the contrary by some quantum of proof". 99 S.Ct. at

E. The Court Improperly Applied Statutory Aggravating Circumstances In Sentencing Defendant To Death.

1. felony murder

Defendant was charged with premeditated first-degree murder. However, at trial, the prosecutor sought a conviction also upon the basis of felony-murder. This is proper under Florida law. Knight v. State, 338 So.2d 201, 204 (Fla. 1976). Since a specific jury verdict was not returned, it cannot be known with any certainty upon which theory the jury convicted defendant.

The court utilized felony murder as an aggravating circumstance under Section 921.141(5)(d). Its application, in a case where the prosecution sought a conviction in part upon a felony-murder theory, violates the Eighth Amendment:

> . . . . Neither do we think the underlying felony should be submitted to the jury as an aggravating circumstance in the sentencing phase when it was the basis for, and an element of, a capital felony conviction.
>
> We are of the opinion that, nothing else appearing, the possibility that a defendant convicted of a felony-murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death due to the "automatic" aggravating circumstance dealing with the underlying felony. To obviate this flaw in the statute, we hold that when a defendant is convicted of first-degree murder under the felony murder rule, the trial judge shall not submit to the jury the aggravating circumstance concerning the underlying felony. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551, 556-57 (1979).

2. especially heinous, atrocious or cruel

The court found the homicide in this case to be within the scope of Section 921.141(h) on the following basis:

> . . . [T]he capital felony was especially heinous, atrocious or cruel, in that, after initially shooting the victim and while the victim lay helplessly bleeding on the floor,

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11 cont.
2456 (original emphasis). The Court ruled that this would have "effectively shift[ed] the burden of persuasion" to the accused, in violation of Mullaney. Id. at 2456, 2459. The instruction in Sandstrom was accordingly held constitutionally deficient. And the same conclusion would be required even if the statute involved in such an instruction did not facially shift the burden of proof -- the critical question is what a jury could have concluded from the instructions of trial court. Hammontree v. Phelps, supra at 1379-80.

> the defendant deliberately leaned over the counter and shot the victim in the head.

This finding cannot support the application of Section 921.141(h).

That subsection establishes a potential aggravating circumstance that the homicide was "especially heinous, atrocious, or cruel." In State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), the Supreme Court of Florida interpreted this subsection to include crimes which are "outrageously wicked and vile". As the Supreme Court of the United States has recently observed in passing upon the validity of a similar provision in the Georgia death penalty law:

> . . . There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Godfrey v. Georgia, ____U.S.____, 100 S.Ct. 1759, 1765 (1980).

Thus, under Godfrey, the definitional language in Dixon is no limitation upon the application of subsection (h). Consequently, in light of that decision, the only manner in which subsection (h) can be constitutionally applied is if its application is limited to the "additional acts" of which the Supreme Court spoke in Dixon:

> . . . What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- The conscienceless or pitiless crime which is unnecessarily torturous to the victim. 283 So.2d at 9.

See also Purdy v. State, 343 So.2d 4, 6 (Fla. 1977).

Under this test, the method by which the homicide is perpetrated is key -- the "additional acts" must be the focus. Lewis v. State, 377 So.2d 640, 646 (Fla. 1979); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). The Godfrey limitation upon subsection (h) renders its application to defendant unconstitutional.

The Supreme Court of Florida has clearly held that "[d]irecting a pistol shot straight to the head of the victim" is not an "especially heinous, atrocious, or cruel" homicide. Kampff v. State 371 So.2d 1007, 1010 (Fla. 1979). Accord Williams v. State, ____So.2d ____, Case No. 50,666 (Fla. 1980), opinion filed June 12, 1980; Downs

v. State, ___So.2d___, Case No. 58,524, (Fla 1980), opinion filed May 22, 1980; Riley v. State, 366 So.2d 19, 21 (Fla. 1978). The only "additional act" which could possibly remove this case from that rule is that the victim was "helpless" at the time of the homicide, having been shot once by defendant.

That is insufficient to establish this circumstance, under well-established Florida law. In Menendez v. State, 368 So.2d 1278, 1281-82 (Fla. 1979), the victim was killed during a robbery, having been shot twice by the accused; the evidence indicated that "his arms may have been in a submissive position at the time he was shot". The Supreme Court held that "there is nothing to set his execution murder 'apart from the norm of capital felonies.'" Id. at 1282. In Riley v. State, supra, three persons in a business were victims of a robbery, and were forced by the accused and an accomplice to lie on the floor; the victims were "bound, gagged, and then shot in the head." 366 So.2d at 20. Two of the victims died, while one (the son of one of the victims), survived. Id. at 21. The Supreme Court held that "[t]here was nothing atrocious (for death penalty purposes) done to the victim, however, who died instantaneously from a gunshot in the head." Id.

The victims in Riley were certainly "helpless" at the time of the homicides, and the victim in Menendez may also have been so. The fact that the victim in this case was shot more than once is of no significance for these purposes; so too was the victim in Menendez. See also Downs v. State, supra. Indeed, in Lewis v. State, supra, the victim was shot once in the chest by defendant and, as he attempted to flee, defendant "shot him several more times in the back." 377 So.2d at 646. The Supreme Court held that "[t]he killing in the case at bar simply does not fall" within the category of subsection (h). Id.

Thus, following the dictates of Godfrey and focusing upon the "additional acts" rather than the "standardless and unchanneled" definition of subsection (h) in Dixon, it is indisputable that this aggravating circumstance was improperly applied by the court in this case. And this error also infects the application of this subsection by the jury; the court did not define subsection (h) in terms of the

requirement of "additional acts in its instruction to the jury (indeed, it defined none of the other aggravating or mitigating circumstances). This invalidates the recommendation of a death sentence. Godfrey v. Georgia, supra at 1765; Gregg v. Georgia, supra.[12]

F. Disparate Appellate Review By The Supreme Court of Florida In This Case Renders The Death Sentence Violative Of The Eighth And Fourteenth Amendments.

A key safeguard against arbitrary death sentences in Florida is the tripartite appellate review performed by the state Supreme Court. Proffitt v. Florida, 428 U.S. 242, 253 (1976). By virtue of its statewide jurisdiction and its commitment to proportionality, the Supreme Court of Florida can assure "consistency, fairness and rationality in the evenhanded operation of the State law." Proffitt v. Florida, 428 U.S. at 259-60; State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). Indeed, the Supreme Court of Florida has noted most recently that the constitutionality of Florida's capital sentencing procedure is contingent upon the Court's role of reviewing each case to ensure uniformity. Witt v. State, ___So.2d___ (Fla. 1980) (Case No. 58,329, Opinion filed 7/24/80).

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[12] As in Godfrey, the improper application of this circumstance "was in no way cured by the affirmance" of the Supreme Court of Florida. 100 S.Ct. at 1765. If anything, the error was rendered more egregious. As noted above, the sole basis for the finding by the trial court that subsection (h) was applicable was the helplessness of the victim. On appeal the Supreme Court of Florida added two further bases: defendant "in a calculated fashion 'executed' the victim to avoid later identification"; and the alleged statements of defendant that "he had killed someone before and it would not bother him to kill again."

Neither of these bases were relied upon by the trial court to establish subsection (h). The first was relied upon by the trial court, but to establish the aggravating circumstance of avoiding a lawful arrest under subsection (e). The second was purportedly introduced to rebut mitigating evidence, but was relied upon by the prosecutor as a non-statutory aggravating circumstance. Evidence of the propensity of a capital defendant to commit violent acts is irrelevant to subsection (h), Elledge v. State, supra, and the expressed state of mind of an accused long after the crime is also irrelevant under Florida law. See Magill v. State, 383 So.2d 901, 904 (Fla. 1980).

The Supreme Court thus improperly relied upon these two additional factors to bolster the improper application of subscription (h) by the trial court. More fundamentally, the affirmance of the death sentence upon a basis not relied upon by the trial court is a due process deprivation. See Presnell v. Georgia, 439 U.S. 14 (1978).

In performing its appellate review, the Supreme Court has held that aggravating factors must be strictly limited and applied; the erroneous consideration of aggravating factors will require resentencing where the effect of the error upon the weighing process cannot be assuredly ascertained. Elledge v. State, 346 So.2d 998 (Fla. 1977). Thus, as a general rule, the Supreme Court has reversed death sentences due to the improper consideration of aggravating factors so long as at least one mitigating circumstance has been found. See e.g., Mikenas v. State, 367 So.2d 606 (Fla. 1978).[13] Since speculation in conducting this review process is constitutionally impermissible, see Godfrey v. Georgia, ____U.S.____, 100 S.Ct. 1759 (1980), the danger that the aggravating error affected the overall sentencing determination can be averted only where no factor in mitigation was found. See, e.g., Jackson v. State, 359 So.2d 1190 (1978); Gibson v. State, 351 So.2d 948 (1977).

Otherwise, the Court cannot reweigh the aggravating and mitigating factors, as it has explained:

> In capital cases, it is this court's responsibility to insure that the trial judge remains faithful to the dictates of Section 921.141, Florida Statutes in the sentencing process. It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court. Mikenas v. State, supra at 610.

The dual aggravating consideration of a single aspect of a capital offense is unlawful under Florida law. Provence v. State, 337 So.2d 783 (Fla. 1976). Thus, where a defendant is doubly penalized for a robbery-murder (aggravating circumstance (d)) committed for pecuniary gain (aggravating circumstance (f)), a resentencing will be required unless the weighing process could not have been affected by the error.

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[13] Indeed, that Court has reversed a death sentence where the sentencing order which reflected the erroneous aggravating factor was merely ambiguous as to whether any mitigating circumstances were found. Elledge v. State, 346 So.2d 998 (Fla. 1977)

The last [illegible] presented in this death penalty review scheme: defendant was doubly penalized for a robbery-murder committed for pecuniary gain despite the expressly found statutory mitigating circumstances of his youth (18 years) and no significant criminal history.[14] Though the Supreme Court acknowledged that a prohibited aggravating factor had been injected into the weighing process, it unilaterally reweighed the remaining aggravating factors and the mitigating factors previously found, and upheld the death sentence.[15]

This total departure from precedent is strikingly at odds with the Court's most recent reaffirmation of that precedent. Gafford v. State, ___So.2d___ (Fla. 1980), involved a premeditated killing during the course of a planned robbery and effected by strangulation and repeated stabbings. The trial judge found that this calculated homicide by Gafford was especially heinous, atrocious and cruel, had been committed during the course of a robbery, and with a pecuniary motive. The trial judge further found two statutory mitigating circumstances, Gafford's age of nineteen and lack of significant criminal history.

The Supreme Court of Florida held that Gafford was entitled to a new sentencing hearing due to the lower court's erroneous consideration of both robbery and pecuniary gain.[16] In applying its prior

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[14] According to the decision of the Supreme Court of Florida, the mitigating evidence further lent some support to the statutory circumstances of domination by the co-defendant and mental impairment. See Hargrave v. State, 366 So.2d at 5-6. Indeed, one member of the Court found evidence of these two circumstances so compelling as to conclusively tip the scales in favor of life. Hargrave v. State, 366 So.2d (Boyd, J. dissenting). This Court recognized the evidence in support of these mitigating factors but, without the benefit of Lockett v. Ohio, 438 U.S. 586 (1978), erroneously failed to consider it. (See Point A supra).

[15] In contrast to this reweighing where an aggravating circumstance improperly considered by trial jury and judge was the Court's refusal to reweigh "statutory" mitigating circumstances which the jury and court erroneously failed to weigh. (See Point A, supra). Ironically, the Court explained its refusal to reweigh the mitigating factors on the ground that this was not a case where the jury and court had not considered "matters it should not have considered." Hargrave v. State, supra at 5. Yet it was precisely such a case with regard to the consideration of the aggravating factors.

[16] The court noted that remand would afford the trial court the opportunity to consider the sentences meted out to co-defendants after Gafford had been sentenced. Notably, this Court did not have the opportunity to consider the twenty-year sentence that had been imposed upon the co-defendant Karge subsequent to defendant's death sentence

precedent, the Court ...led:

> We find, however, that in the instant case the doubling up of the aggravating factors coupled with the fact that the trial court found two mitigating circumstances requires us to remand under the doctrine we expressed in Provence and Gibson. Gafford v. State, supra (slip opinion).

In the case at bar, the factors in aggravation are virtually identical to those found in Gafford, save for the fact that defendant's offense was far less egregious. See Point D, supra. The same exact two mitigating factors in Gafford were specifically found by the courts in this case. The inexplicable disparity in result violates the Eighth Amendment as well as denying defendant due process and equal protection under the state and federal constitutions. See Isaac v. Engle, ____F.2d____, Case No. 78-3488 (6th Cir. 1980), opinion filed February 8, 1980; Bishop v. Mazurkiewicz, 484 F.Supp. 871 (W.D.Pa. 1980

The Court's disparate treatment in capital cases renders the Florida death penalty scheme unconstitutional as applied. Reliable death sentences are impossible where the Supreme Court speculates as to the mental processes of trial jury and judge.

G. The Death Penalty Is A Disproportionate Punishment In This Case.

In determining the propriety of death as punishment, "'There (must) be taken into account the circumstances of the offense together with the character and propensities of the offender.'" Gregg v. Georgi 428 U.S. 153, 190 (1976) (citation omitted). The inquiry is thus focused on "the particularized circumstances of the individual offense and the individual offender". Jurek v. Texas, 428 U.S. 262, 274 (1976 The punishment of death fits neither the offense in this case nor the defendant.

A punishment which is "excessive" in relation to the crime is barred by the Eighth Amendment. Gregg v. Georgia, supra at 171-73. An "excessive" punishment is one which "is grossly out of proportion to the severity of the crime." Coker v. Georgia, 433 U.S. 584, 592 (1977). Death is an "excessive punishment" for the offense in this case.

The death penalty is "an extreme sanction, suitable to the

most extreme of crimes." Gregg v. Georgia, supra at 187. In Florida, death sentences have been upheld only for such crimes. See, e.g. Foster v. State, 369 So.2d 928, 931 (Fla. 1979)(defendant, after engineering robbery of victim, cut his throat, dragged him into undergrowth, and returned to cut his spine); Smith v. State, 365 So.2d 704, 706-07 (Fla. 1978)(defendant forced victim into trunk of car at knifepoint, drove to secluded location, opened trunk and beat victim with a tire iron, saturated car with gasoline, and burned victim to death); Hoy v. State, 353 So.2d 826, 833 (Fla. 1977)(Defendant and accomplice raped young girl in presence of her fiance, killed him in her presence, shot her twice, raped her a second time, and then killed her); Adams v. State, 341 So.2d 765, 769 (Fla. 1976)(victim murdered by beating him "past the point of submission and until his body was grossly mangled"); Gardner v. State, 313 So.2d 675, 676 (Fla. 1975) (victim suffered approximately one hundred bruises to body, sexual mutilation, and massive hemorrhages of the head).

This case is simply not within the classification of these "most extreme of crimes". Taken in a light most favorable to the State, two proper aggravating circumstances exist, but this alone does not warrant the imposition of death. See Alvord v. State, 322 So.2d 533, 540 (Fla. 1975). In Provence v. State, 337 So.2d 783, 784 (Fla. 1976), the defendant murdered the victim by stabbing him, and, as here, the killing occurred during a robbery. Circumstantial evidence indicated that the homicide had been previously planned by the defendant. Id. at 784-85. In Provence, unlike this case, no mitigating circumstances were found.

Nonetheless, the Supreme Court held that "the circumstances of this case are less aggravated than those present in other cases where this Court has reversed the trial court's imposition of the death penalty", and ruled that "the circumstances of the instant case do not call for the imposition of the death penalty." Id. at 787. The same conclusion is required here. Unlike Provence, the homicide in this case was perpetrated by gunshot -- and could not be within the definition of an "especially heinous" felony -- and was committed during a robbery. If anything, the actual homicide in Provence was more aggravated than that in this case.

Simply state there is "nothing more ocking in the actual killing (in this case) than in a majority of murder cases", and death is therefore a disproportionate penalty. Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975). The imposition of death in this case "would not be consistent with other sentences imposed in similar circumstances", and cannot be upheld on the basis of the crime. Malloy v. State, 382 So.2d 1190, 1193 (Fla. 1979)(original emphasis). "There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not", and the sentence is therefore violative of the Eighth Amendment. Godfrey v. Georgia, 100 S.Ct. 1765, 1767 (1980).

This conclusion is rendered of yet greater force when the powerful mitigating circumstances in the attached proffer are considered. Briefly, the evidence establishes that defendant was a viciously and tragically abused child, left dependent and victimized, perpetually searching for a "safe" place and a caretaker. See reports of Dr. Doris B. Stiles, Dr. Jeffrey J. Elenewski and Ms. Evalyn Milledge in Proffer in attached appendix. The evaluations of defendant and his family establish that his "caretaker", during his adolescent years, was Lawrence Karge (the co-defendant who instigated and planned the robbery and who, some two weeks after the trial of defendant was permitted to plead guilty to second-degree murder and was sentenced to 20 years). Id. As Dr. Stiles concludes:

> Lenson's needs for a nurturing caretaker, someone to relieve his overwhelming tension, anxiety, and fear, were met by Larry. . . . Lenson (was) able to talk to Larry. Under such circumstances, Lenson did anything and everything he could to please Larry, his new-found caretaker. Inasmuch as Larry is not a "domineering" person, Lenson's needs to please his perceived caretaker placed Larry in a position of strong control and dominance over Lenson. Report of Dr. Stiles at 42-43.

Dr. Stiles places the homicide in the context of the life history of defendant:

> Lenson's commission of armed robbery, and murder must be placed in the context of his family system. It is noteworthy that both of his parents have also committed serious acts (rape, aggravated assault, embezzlement) that could be considered criminal, as have at least two of his siblings (Child abuse, armed robbery). The consequence

> of the dysfunctional marital system on the children was inevitable since there was no appropriate therapeutic intervention to modify the family system. . . .
>
> When Lenson met Larry, they were friends, with Larry being a good listener for Lenson, and Lenson boosting Larry's ego with his loyalty. . . . . Larry planned the armed robbery, requesting Lenson to carry it out. Lenson agreed, especially when Larry suggested he might be "chicken." ANY PERCEIVED LOSS OF LARRY AS CARETAKER would have been psychologically intolerable to Lenson. . . . .
>
> Lenson agreed to robbery to please his "caretaker" in a familiar manner, by stealing. He had already learned, in his family of origin, that stealing is acceptable behavior when it is done for someone you love. When the attempted robbery was flawed by a jammed cash register, Lenson experienced further overwhelming constriction of his options . . . and pulled the trigger because, for him, there was no other choice. He shot again, to kill, for the same reason: he believed he had no other choice. His decision to kill was not premeditated but rather based on a very limited emotional/cognitive state, limited to one alternative, in order to preserve a relationship he believed he needed. Report of Dr. Stiles at 44-45.

Dr. Elenewski states:

> . . .There exists substantial evidence from numerous observers of the physical, sexual and mental abuse to which Mr. Hargrave was exposed. The portrait that emerges is one of a crucible of rejection, abuse, and usery. Mr. Hargrave apparently did emerge from this crucible with sufficient mettle to function as an independent adult. . . . My findings strongly support and confirm the existence of a family constellation replete with classical dynamics of physical, sexual and mental abuse. Mr. Hargrave's present psychological condition continues to show the deep emotional scars as well as chronic long-term psychopathology. The final picture which emerges is one of a dangerously disturbed, bizarre, and frankly, pathetic human being. Given his family and social context, it can be seen as inevitable that Mr. Hargrave would become a tragic and violent example of the human condition.
>
> * * *
>
> Taken as a whole, the results of the psychological testing place Mr. Hargrave in the diagnostic category of a severe Personality Disorder, Mixed Type. Alternative diagnoses are Personality Disorder, Inadequate Type and Personality Disorder, Dependent Type, both with Anti-social features. Testing indicates that Mr. Hargrave's behavioral pattern is characterized by pervasive ineffectual responses to emotional, social, intellectual and physical demands. . . .His personality structure indicates that he is the sort of individual who passively allows others tc assume responsibility for major areas of his life because of a lack of self-confidence and an inability to function independently. Mr. Hargrave subordinates his needs

> to those or others upon whom he [illegible]en[illegible]t in order to avoid any possibilit[illegible] of having to be self-reliant. Throughout his life Mr. Hargrave has always identified an external other who would fulfill the role of some sort of protector or (overseer). In his early development; it was his Mother. Later this function was taken over by his friend and companion, Larry Karge. . . .
>
> * * *
>
> . . . The information available to me suggests that Mr. Hargrave was involved in an intense pathological and symbiotic relationship with Mr. Karge. It is, therefore, psychologically consistent that he would perceive unacceptable rejection and derogation when Mr. Karge called him "chicken." It would also be psychologically consistent for Mr. Hargrave to engage in illegal stealing behavior for a loved one. His participation in the act of robbery and homicide can logically be viewed as the final explosion into consciousness of years of bottled up anger, rage, and alienation. For Mr. Hargrave, the taking of another person's life was most probably neither premeditated nor planned. His act of murder most probably was the uncontrolled and automatic behavior of a frustrated, frightened and overwhelmed human being. It was the clearly violent and unjustified act of a tormented, long abused and emotionally inadequate person. In the final analysis it can be seen as a tragically understandable act of a physical adult who was still functioning on the emotional level of an abused child. Report of Dr. Elenewski at 2, 6-7.

These brief excerpts from the attached proffer clearly indicate the range and breadth of the mitigating evidence in this case. That evidence is rendered of yet more effect in that it establishes a "causal relationship" between the mitigating factors present and the actual offense; the Supreme Court has consistently focused on such a "causal relationship" in reducing death sentences. See Miller v. State, 373 So.2d 882 (Fla. 1979); Huckaby v. State, 343 So.2d 29 (Fla. 1977). In short, neither the offense nor defendant, standing alone, warrant the imposition of the death sentence; considered together -- as they must be, Jurek v. Texas, supra -- they mandate its reduction to a life sentence.

CONCLUSION

Based upon the foregoing, defendant respectfully requests this Court to stay the pending death warrant (see simultaneously filed motion for stay of execution), grant an evidentiary hearing and an opportunity to fully brief the issues raised herein, and to vacate the judgment and/or sentence imposed in this cause.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1351 Northwest 12th Street
Miami, Florida 33125

BY: _____
ELLIOT H. SCHERKER
Assistant Public Defender

_____
KAREN M. GOTTLIEB
Assistant Public Defender

_____
BETH C. WEITZNER
Assistant Public Defender

_____
ROBERT R. SCHRANK
Assistant Public Defender

_____
WARREN S. SCHWARTZ
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing motion was hand delivered to the Office of the State Attorney, 1351 Northwest 12th Street, Miami, Florida, and delivered to Joel D. Rosenblatt, Assistant Attorney General, Room 820, 401 Northwest 2nd Avenue, Miami, Florida 33128, this 19th day of September, 1980.

_____
ELLIOT H. SCHERKER
Assistant Public Defender

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY
CRIMINAL DIVISION

CASE NO. 75-118A

THE STATE OF FLORIDA,

Plaintiff,

vs

LENSON A. HARGRAVE,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT AND SENTENCE, DEFENDANT'S MOTION FOR STAY OF EXECUTION, STATE'S MOTION TO DISQUALIFY THE PUBLIC DEFENDER AND GRANTING DEFENDANT'S MOTION FOR EXPEDITED TRANSCRIPT

* * * * * * * * * * *

THE ABOVE CAUSE came before this Court for hearing upon the following pleadings: (1) Defendant's Motion to Vacate Judgment and Sentence and the State's Response thereto; (2) State's Motion to Disqualify the Public Defender, (3) Defendant's Motion for Stay of Execution.

Because of the nearness of date of execution, and the fact that regardless of this ruling, it would be immediately appeal it was agreed by respective counsel that rather than the Court preparing a written order of disposition, the parties would use the transcript of the proceedings as an order for the purpose of appeal to the Supreme Court of Florida; nevertheless, this Court, in order to eliminate any possibility of technical error, herewith submits its written order concerning the above motions. The Court considered the pleadings, oral argument by respective counsel and citations of law submitted by respective counsel.

As to defendant's Motion to Vacate Judgment and Sentenc the State opposed on two grounds; first, that the motion was not und oath; and second, that the motion is legally insufficient in that it presents grounds that were actually litigated on direct appeal or are otherwise inappropriate for a motion to vacate. Because of the time element and all other circumstances, the Court chose to disreg the fact that the motion was not under oath, counsel for defendant having assured the Court that a verification under oath could be obtained from defendant or defendant would testify personally to the Court in that regard. The Court is of the opinion that the State's position on the merits is well taken and that the Motion to Vacate insufficient as a matter of law, on the grounds cited by the State.

As to the State's M[illegible]ion to disqualify the Public Defender, the Court is of the opinion that the State's motion has merit but that again because of the element of time and to resolve every possible doubt in favor of the defendant, the Court chooses to deny the State's motion, at least until such time as this order can be ruled upon by the Supreme Court of Florida on appeal.

As to defendant's Motion for Stay of Execution, the Court is of the opinion that this Court's Judgment and Sentence, having been affirmed by the Supreme Court of Florida and the defendant's application to the Supreme Court of the United State for relief having been denied, this Court finds no reason to further delay the execution of the judgment and sentence, defendant having the opportunity to have a ruleing on this question by the Supreme Court of Florida.

After the Court had so ruled on the above motions, the defense moved for the authority to order expedited transcript of the proceedings. The State objected thereto. The Court is of the opinion that the State's objections contain some merit; however, again the Court resolves the doubt in favor of the defendant so that this matter can proceed to the Supreme Court of Florida expeditiously; wherefor it is,

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion to Vacate Judgment and Sentence be, and the same, is hereby DENIED;

2. That the State's Motion to Disqualify the Public Defender, be, and the same, is hereby DENIED;

3. That defendant's Motion for Stay of Execution, be, and the same, is hereby DENIED;

4. That Defendant's Motion for authority to order expedited transcript of the proceedings, be, and the same, is hereby GRANTED.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 10th day of October, A. D., 1980.

Gene N. Williams
CIRCUIT JUDGE

cc: Jim Smith Attorney General
Elliot H. Scherker, Pub. Defender

Supreme Court of Florida

No. 59,731

LENSON A. HARGRAVE, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[April 2, 1981]

PER CURIAM.

Appellant Lenson A. Hargrave brings this appeal to review the trial court's denial of his motion to vacate sentence under Florida Rule of Criminal Procedure 3.850. Appellant was sentenced to death for first-degree murder on July 18, 1975. His conviction and sentence were affirmed by this Court on direct appeal. Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 913 (1979).

Hargrave filed his 3.850 motion to vacate and a motion for stay of execution on September 19, 1980. The trial court denied both motions ore tenus on September 26, 1980, followed by a written order filed on October 10, 1980. The 3.850 motion asserts a multitude of grounds for relief, from constitutional and non-constitutional error in the guilt phase of the trial to alleged fundamental defects in the sentencing process.* The trial court found, and we so hold, that the issues raised by appellant either were or could have been raised on direct appeal.

* On September 23, 1980, Hargrave brought a petition for writ of habeas corpus in this Court, alleging ineffective assistance of appellate counsel due to counsel's failure to raise the issues on direct appeal. We denied the petition on September 24, 1980. Hargrave v. Wainwright, No. 59,701 (Fla. Sept. 24, 1980).

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or they involve changes in decisional law not cognizable in a 3.850 motion. See Adams v. State, 380 So.2d 423 (Fla. 1980); Sullivan v. State, 372 So.2d 938 (Fla. 1979.; Spenkelink v. State, 350 So.2d 85 (Fla.), cert. denied, 434 U.S. 960 (1977); State v. Matera, 266 So.2d 661 (Fla. 1972); Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied, 101 S.Ct. 796.

Accordingly, the order of the trial court denying 3.850 relief is affirmed, and the motion for stay of execution pending disposition of this appeal is denied.

SUNDBERG, C.J., ADKINS, BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Dade County,

Gene Williams, Judge - Case No. 75-118A

Bennett B. Brummer, Public Defender, and Elliot H. Scherker, Karen M. Gottlieb, Beth C. Weitzner and Robert R. Schrank, Assistant Public Defenders, Miami, Florida,

for Appellant

Jim Smith, Attorney General, and Joel D. Rosenblatt, Assistant Attorney General, Miami, Florida,

for Appellee

THE SOUTHERN DISTRICT OF FLORIDA

LENSON A. HARGRAVE,	:	
Petitioner,	:	CASE NO. 80-2679-CIV-JWK
v.	:	
LOUIE L. WAINWRIGHT, etc.,	:	ORDER OF DISMISSAL
Respondent.	:	

/

On May 6,1981 petitioner filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 after taking a voluntary dismissal of his initial petition that was filed in this Court on September 25,1980. His second petition, like the first one, seeks discharge from his judgment of conviction and sentence of death on the grounds that his conviction and death sentence was imposed upon him in violation of his constitutional rights. Specifically, petitioner asserts (1) that he received ineffective assistance of appellate counsel during his direct appeal, and (2) that he is affected by numerous sentencing irregularities which should result in the setting aside of his sentence of death.

Respondent has moved to dismiss the petition on the grounds, inter alia, that petitioner has not yet exhausted all of his state remedies prior to federal habeas corpus review. Respondent contends that petitioner has filed a mixed petition that contains both exhausted and unexhausted claims and therefore is subject to dismissal under the comity doctrine expressed in Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978). Petitioner has responded in opposition to this motion.

Because of the obvious importance of the matter, the Court held a hearing on the motion to dismiss and heard argument of counsel on the issues raised therein. While the Court does not fully accept the respondent's contention that exhaustion is required in this instance, in light of the recent pronouncement of the United State Supreme Court in Estelle v. Smith, 49 U.S.L.W. 4490 (1981), it is the Court's judgment that a return to the state for reconsideration of the issue raised in the petition challenging the admission into evidence of testimony by a court-appointed psychologist would not be fruitless. It appears that

the law has changed sufficiently to warrant reexamination of the issue by the state courts.

The Florida Supreme Court has recently had occasion to comment upon the finality of postconviction relief under these circumstances:

> [W]e today hold that an alleged change of law will not be considered in a capital case under Rule 3.850 unless the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.

Witt v. State, 387 So2d 922, 931 (Fla. 1980).

Whether the issue raised by petitioner sub judice meets the criteria set forth above should be finally decided by the state courts, not this Court. Accordingly, this Court will refrain from deciding the federal issues raised by the petitioner until the Florida courts have the opportunity to review whether petitioner's sentence of death should be upheld where a court appointed psychologist was allowed to testify as to his examination of petitioner without first advising petitioner of his Miranda rights.

It is therefore

ORDERED AND ADJUDGED that the motion to dismiss is GRANTED and this cause is hereby DISMISSED without prejudice to reapply after all issues have been fully exhausted in the state courts.

DONE AND ORDERED in Chambers at Miami, Florida, this 19th day of June 1981.

James W. Kehoe
JAMES W. KEHOE
UNITED STATES DISTRICT JUDGE

Copies Furnished to:

Elliot H. Scherker, Esq.
Joel D. Rosenblatt, Ass't Atty Gen.

PETITION FOR WRIT OF HABEAS CORPUS

UNDER 28 U.S.C. § 2254

80-2679 -CIV-JWK

Name: Lenson Hargrave

Prison number: 047810

Place of confinement: Florida State Prison, Starke, Florida

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

LENSON A. HARGRAVE,

Petitioner,

vs. CASE NUMBER:

LOUIE L. WAINWRIGHT, as Secretary, Department of Corrections, State of Florida,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS
BY PERSON IN STATE CUSTODY

1. The name and location of the court which entered the judgment of conviction and sentence under attack are:

a. Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County.

b. Honorable Gene Williams, Circuit Judge, Miami, Dade County, Florida.

FILED 5/24/83 TO JUDGE

BY

2. The date of the judgment of conviction is July 18, 1975.

3. The sentence is death by electrocution.

4. The nature of the offense involved is first-degree murder.

5. Petitioner entered a plea of not guilty.

6. Petitioner was tried by jury.

7. Petitioner did not testify at trial.

8. Petitioner appealed from the judgment and sentence.

9. The history of the direct appellate proceedings is as follows:

a. The Supreme Court of Florida affirmed the judgment and sentence of the trial court on June 20, 1978. Hargrave v. State, 366 So.2d 1 (Fla. 1978)(Boyd and Hatchett, JJ. dissenting). A timely petition for rehearing was denied on February 6, 1979.

b. The Supreme Court of the United States denied a petition for writ of certiorari on October 15, 1979. Hargrave v. Florida, 444 U.S. 919 (1979). Rehearing was denied on December 3, 1979.

10. In addition to the above-described direct review proceedings, the other petitions, applications, motions or proceedings filed on behalf of petitioner with respect to the judgment attacked herein are described in paragraph 11 below.

11.

a. Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure in the Circuit Court of the Eleventh Judicial

Circuit of Florida on September 23, 1980. The motion was denied on September 26, 1980. A timely appeal from this order was taken to the Supreme Court of Florida. On April 2, 1981, the Supreme Court affirmed the order of the trial court. Hargrave v. State, 396 So.2d 1127 (Fla. 1981).

b. A petition for writ of habeas corpus was filed in Supreme Court of Florida on September 23, 1980. The petition was denied on September 24, 1980. Hargrave v. Wainwright, 388 So.2d 1021 (Fla. 1980).

c. A petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 was filed in this Court on September 25, 1980, prior to full exhaustion of state remedies. The petition was voluntarily dismissed pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure subsequent to the grant of a stay of execution by the Supreme Court of Florida. See subparagraph d, infra.

d. A joint application for extraordinary relief and petition for writ of habeas corpus was filed on behalf of 123 death-sentenced defendants, including petitioner, in the Supreme Court of Florida on September 29, 1980. On that date, the Supreme Court issued an order staying the execution of petitioner. The petition was denied on January 15, 1981. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for writ of certiorari was denied on November 2, 1981. Brown v. Wainwright, 454 U.S. 1000 (1981).

e. A petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 was filed in this Court on May 6, 1981. The petition was dismissed without prejudice for further exhaustion of state remedies on June 19, 1981.

f. A motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure was filed in the Circuit Court of the Eleventh Judicial Circuit of Florida on July 13, 1981. The motion was denied on February 26, 1982. A timely appeal from the order was taken to the Supreme Court of Florida, which affirmed the order of the trial court on January 13, 1983. Hargrave vs. State, ____So.2d____, Case No. 61, 869 (Fla. 1983), opinion filed January 13, 1983. Rehearing was denied on

GROUNDS FOR RELIEF

12. The conviction and death sentence in this case are violative of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States:

A. Denial of effective assistance of appellate counsel: petitioner was denied the effective assistance of court-appointed appellate counsel in violation of the Sixth and Fourteenth Amendments, due to the failure of counsel to raise on direct appeal two meritorious issues relating to the conviction of petitioner, which had been properly raised and preserved for appellate review in the trial court, and which would have had an arguable

chance of success on direct appeal.

1. In trial proceedings, counsel for petitioner moved to suppress a post-arrest statement of petitioner, the only evidence of his participation in this offense which was introduced at trial, on the ground that it was the product of an unlawful arrest. This issue was not raised on direct appeal.

2. During the course of trial, the prosecutor and the trial judge repeatedly made comments which referred to the fact that petitioner had not testified at trial. Trial counsel properly objected to these comments and repeatedly moved the court to grant a mistrial. This issue was not raised on direct appeal.

3. See attached memorandum of law for additional facts.

B. Denial of fair and impartial jury: the exclusion from the jury panel of persons morally opposed to death penalty and/or persons who would not vote to impose a death sentence but who could have been fair on the issue of guilt or innocence denied petitioner a jury selected from a fair cross-section of the community and a neutral and impartial jury, in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States (see attached memorandum for additional facts).

C. Denial of full opportunity to present and consideration of mitigating circumstances in imposition

and review of death sentence: petitioner was deprived of the means and opportunity to present all relevant evidence in mitigation of sentence at trial, by the ruling of the trial court and the belief of counsel for the parties that potential mitigating circumstances were limited to those specified in Section 921.141(6), Florida Statutes (1975), the instructions of the trial court and comments of the prosecutor to the jury that the mitigating circumstances were so limited, and the restriction by the trial court upon the range of mitigating circumstances in its imposition of a death sentence, and was denied full consideration of mitigating circumstances by the Supreme Court of Florida in its review of the death sentence, in violation of the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States (see attached memorandum for additional facts).

D. Admission into evidence of psychological testimony obtained in violation of privilege against self-incrimination and right to counsel in sentencing phase: the presentation by the prosecution in the penalty phase of the trial of the testimony of a court-appointed psychologist who had examined petitioner to determine his competency to stand trial violated the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States in that neither petitioner nor his counsel were advised prior to the

examination that the results of the examination could be introduced in seeking the death penalty, and petitioner was not advised that he had a right to remain silent, could terminate the interview if he so wished, or that he could confer with counsel prior to the examination (see attached memorandum for additional facts).

E. Overbroad application of aggravating circumstance: the trial court failed to properly limit the application of Section 921.141(h), Florida Statutes (1975), in its instructions to the jury and the trial court and the Supreme Court of Florida found subsection (5)(h) applicable to this case based upon an overbroad construction of that circumstance, in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States (see attached memorandum for additional facts).

F. Reweighing of aggravating and mitigating circumstances by state supreme court: the Supreme Court, after finding that the trial court had erred in applying an aggravating factor in sentencing petitioner to death, reweighed the remaining aggravating circumstances and the mitigating circumstances and determined that death was the appropriate sentence, in violation of its own precedent and the Eighth and Fourteenth Amendments to the Constitution of the United States.

G. Disproportionate imposition of death sentence: the imposition of a death sentence, on the facts of this

case, is disproportionate in comparison with other Florida cases in which death has been held an inappropriate punishment, and in contrast with Florida cases in which death has been held properly imposed, rendering the death sentence in this case unlawful under the Eighth and Fourteenth Amendments to the Constitution of the United States (see attached memorandum for additional facts).

13. Each of the grounds listed in paragraph 12 have been presented to the Supreme Court of Florida.

14. There are no petitions, motions, or applications pending in any court with respect to the conviction and sentence in this case.

15. Petitioner has been represented by the following counsel:

a. at trial and sentencing by Douglas Williams and Michael Tarre of Miami, Florida.

b. on direct appeal to the Supreme Court of Florida and on the petition for writ of certiorari in the Supreme Court of the United States by Bennett E. Brummer, Public Defender and Paul Morris, Assistant Public Defender and Elliot H. Scherker, Karen M. Gottlieb, Beth C. Weitzner, Robert R. Schrank, and Warren S. Schwartz, Assistant Public Defenders, of Miami, Florida.

16. Petitioner was not sentenced on more than one count of an indictment or on more than one indictment in the same court at the same time.

sentence of death, and to grant such and further relief as this Court shall deem appropriate.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit of Florida
1351 Northwest 12th Street
Miami, Florida 33125
(305) 545-3005

BY: Elliot H. Scherker
ELLIOT H. SCHERKER
Assistant Public Defender

Karen M. Gottlieb
KAREN M. GOTTLIEB
Assistant Public Defender

VERIFICATION

STATE OF FLORIDA

SS

COUNTY OF BRADFORD

BEFORE ME, the undersigned, personally appeared LENSON A. HARGRAVE, who being first duly sworn, deposes and says that the facts in the foregoing petition are true and correct to the best of his knowledge and belief.

LENSON A. HARGRAVE

Sworn to and subscribed before me this 26 day of January, 1983.

Notary Public
State of Florida at Large
NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES MAR. 26, 1984

STATE OF FLORIDA

SS

COUNTY OF DADE

BEFORE ME, the undersigned, personally appeared ELLIOT H. SCHERKER, who being first duly sworn, deposes and says that the facts in the foregoing petition are true and correct to the best of his knowledge and belief.

ELLIOT H. SCHERKER

Sworn to and subscribed before me this 24th day of March, 1983.

Notary Public
State of Florida at Large
Notary Public, State of Florida
My Commission Expires Feb. 6, 1984
Bonded Thru Troy Fain-Insurance, Inc.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing petition for writ of habeas corpus by person in state custody was hand delivered to PAUL MENDELSON, Assistant Attorney General, 401 N.W. Second Avenue, Room 820, Miami, Florida this 24th day of March, 1983.

ELLIOT H. SCHERKER
Assistant Public Defender

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

CASE NO. 84-5102

LENSON A. HARGRAVE,

Petitioner/Appellant,

vs.

RICHARD DUGGER, Secretary,
Department of Corrections,
State of Florida,

Respondent/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Nature of Preference

Habeas Corpus, 28 U.S.C. §2254

EN BANC BRIEF OF RESPONDENT/APPELLEE

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

RICHARD E. DORAN
RALPH BARREIRA
Assistant Attorneys General
Ruth Bryan Owen Rhode Building
Florida Regional Service Center
401 N.W. 2nd Avenue (Suite 820)
Miami, Florida 33128
(305) 377-5441

STATEMENT REGARDING PREFERENCE

This appeal is taken from a final order denying a petition for writ of habeas corpus filed on behalf of petitioner-appellant, a state prisoner, under 28 U.S.C. §2254. Pursuant to Eleventh Circuit Rule II, this case is entitled to preference under subsection (a)(3) of Appendix One to the rules.

STATEMENT REGARDING ORAL ARGUMENT

This Court has ordered this cause to be heard en banc with oral argument.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 84-5102

LENSON A. HARGRAVE,

Petitioner-Appellant,

vs.

RICHARD DUGGER, as
Secretary, Department of Corrections,
State of Florida,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

EN BANC BRIEF OF RESPONDENT-APPELLEE

STATEMENT OF THE ISSUES

I

WHETHER THE DEATH SENTENCE IMPOSED UPON PETITIONER IS UNLAWFUL, IN THAT HE WAS DENIED THE OPPORTUNITY TO PRESENT AND HAVE CONSIDERED NON-STATUTORY MITIGATING CIRCUMSTANCES AT SENTENCING, THE JURY WAS INSTRUCTED TO WEIGH AS MITIGATING ONLY THAT EVIDENCE WHICH SATISFIED THE STANDARDS OF THE STATUTORY MITIGATING CIRCUMSTANCES, AND THE TRIAL COURT AND STATE SUPREME COURT FAILED TO GIVE MITIGATORY WEIGHT TO NONSTATUTORY MITIGATING CIRCUMSTANCES.

II

WHETHER SECTION 921.141(5)(h), FLORIDA STATUTES (1975), ESTABLISHING AS A POTENTIAL AGGRAVATING CIRCUMSTANCE THAT A HOMICIDE WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL," IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS APPLIED IN THIS CASE BY THE STATE TRIAL COURT AND SUPREME COURT.

INTRODUCTION

This appeal was taken from a final order of the United States District Court for the Southern District of Florida denying a petition filed on behalf of Hargrave, a state prisoner in the custody of Richard Dugger, the Secretary of the Florida Department of Corrections.

The symbol "R" will be utilized to designate Volumes I and II of the Record on Appeal and the symbol "T" to designate Volume III of the record. The appendix to the petition, which has been transmitted to this Court by the district court, will be referred to as follows: the symbol "S.R." will designate Volumes I through IV, which are comprised of excerpts from the state-court record, and the symbol "S.T." will designate Volumes V through X, the state transcript. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case set out in its original brief. Additional copies of this brief can be provided in speedy fashion if requested.

STATEMENT OF JURISDICTION

This appeal was taken from a final order denying a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291 and 28 U.S.C. §2253.

SUMMARY OF ARGUMENT

The panel opinion in this case, Hargrave v. Wainwright, 804 F.2d 1182 (11th Cir. 1986) accurately assess the impact of controlling circuit precedent on the facts developed from an extensive and detailed state court record and no remand is necessary for a further evidentiary hearing. Petitioner's allegations of conflict between the panel decision and other circuit decisions are easily difused by careful review of the facts and attendant circumstances.

The Lockett claims are procedurally barred and not subject to an exception based on "cause and prejudice" or any inconsistent application of the state procedural bar by the state court. Furthermore, like so many former state petitioners, this Defendant had the benefit of strong representation of counsel, including the presentation of non-statutory mitigating evidence to both the jury and trial court. As such the claimed Lockett violations are meritless.

The constitutional challenge to the application of the aggravating factor "heinous, atrocious and cruel" was denied by the panel and not raised in the petition for rehearing. It therefore merits no consideration. In any event no

conflict is shown and the caselav continues to prove this factor was correctly applied in this case.

ARGUMENT

I

THE DEATH SENTENCE IMPOSED UPON THE PETITIONER IS NOT UNLAWFUL IN THAT HE WAS GRANTED THE OPPORTUNITY TO PRESENT AND HAVE CONSIDERED NON-STATUTORY MITIGATING EVIDENCE AT HIS SENTENCING; THE JURY WAS NOT INSTRUCTED IN A MANNER THAT LIMITED ITS ABILITY TO WEIGH AS MITIGATION THAT EVIDENCE PRESENTED BY THE PETITIONER WHICH FELL OUTSIDE THE STATUTORY MITIGATING FACTORS; AND THE TRIAL JUDGE AND STATE SUPREME COURT CORRECTLY EVALUATED AND WEIGHED THE NON-STATUTORY MITIGATING CIRCUMSTANCES IN A MANNER CONSISTENT WITH THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

This case is before this Court en banc following the petition for rehearing and suggestion for rehearing en banc by Petitioner in Hargrave v. Wainwright, 804 F.2d 1182 (11th Cir. 1987). Petitioner suggests the panel opinion is in conflict with a number of prior opinions of this Court: Adams v. Wainwright, No. 86-3207 (11th Cir. 1986) (rehearing pending); Oliver v. Wainwright, 795 F.2d 1524 (11th Cir. 1986); Campbell v. Wainwright, 738 F.2d 1573 (11th Cir. 1984); Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983).

and Proffit v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). Petitioner also suggests conflict with Eddings v. Oklahoma, 455 U.S. 104 (1982). (Petition for rehearing and suggestion for rehearing en banc, page i).

Even under the very focused standard for rehearing in Rule 26 of the Rules of the Eleventh Circuit Court of Appeals, the request for rehearing was limited to two matters. First, whether the panel was correct in finding the Petitioner failed to properly raise the merits of his jury instruction claim, his trial counsel's ineffectiveness claim or his trial court method of sentencing claim [All under the umbrella of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982)] and was barred from raising those claims in federal court due to a lack of showing of either cause or prejudice that would excuse the lack of diligence in state court. Second, whether the panel's discussion of "cause" to excuse a procedural bar conflicts with Adams v. Wainwright, supra and additionally ignores a line of prior decisions holding the "Lockett claims" were unavailable to lawyers defending accused and/or convicted murders in Florida during the same period of time as Petitioner's case. At the time of filing for rehearing

and rehearing en banc Petitioner was apparently satisfied with the remaining portions of the panel opinion. The Respondent will therefore endeavor to show why the panel opinion is in harmony with the general law in the circuit, and not factually in conflict with the cases cited by Petitioner, where the Petitioner has incorrectly applied existing precedent to the facts of this case, and how the court en banc might approach this case with an eye towards diffusing any perceived conflict among the decisions.

A. PETITIONER'S CLAIM IS BARRED FROM FEDERAL HABEAS CORPUS REVIEW BY STATE PROCEDURAL DEFAULT.

1. THE JURY INSTRUCTION CLAIM

In Straight v. Wainwright, 772 F.2d 674 (11th Cir. 1985) this Court reaffirmed previous panel decisions holding that the State of Florida consistently applies a contemporaneous objection requirement to direct appeal issues and a procedural bar to attempts at litigating direct appeal issues by collateral attack. One of the claims raised in Straight concerned the jury instruction on mitigation:

> During the penalty phase of Straight's trial, the trial judge instructed the jury, "The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence." State Record Vol. 14, pp. 29-30. The judge then read the statutory aggravating circumstances. She next instructed the jury, "The mitigating circumstances which you may consider, if established by the evidence, are these..." Id. p. 32. The statutory mitigating circumstances were read. Straight contends that the latter instruction failed to adequately inform the jurors that they could also consider non-statutory factors in mitigation. He suggests that his prior history of drug abuse and psychotherapy and his less extensive participation in the murder were two non-statutory mitigating circumstances that could have been considered by the jury. The district court found that Straight had failed to object in the trial court or on direct appeal as required by Florida law, thereby precluding a review in the federal courts. We agree with the district court.
>
> Id. at 677.

This case mirrors Straight. The panel notes that no objection was raised at trial to an instruction on mitigation that was identical to the instruction found in Straight. (ST.982-985). The panel opinion also notes the Petitioner failed to brief the matter of jury instruction in accordance with the Florida Rules of Appellate Procedure (1962), by not raising the issue in his an initial brief.

Thus, by waiting until an opinion was filed and raising the claim in a motion for rehearing the Petitioner procedurally defaulted in state court on the jury instruction issue. Hargrave v. Wainwright, 804 F.2d at 1187-88.

With all due respect for the panel, there is no need to discuss whether the state supreme court reviewed the motion for rehearing on the issue of jury instructions. The Respondent has continuously argued, in the federal district and circuit court, that the issue was waived in the trial court. Florida Rule of Criminal Procedure 3.390(d). (Brief of Respondent, pages 23-24). Unless a jury instruction is subject to contemporaneous objection so as to advise the trial court of a perceived error and allow it the opportunity to correct that error, the matter is not subject to review on appeal. "The Florida courts have applied this rule consistently." Francois v. Wainwright, 741 F.2d 1275, 1286 (11th Cir. 1984) and the state cases cited therein. Accordingly, the district court should be and can be affirmed without discussion of the rehearing process unless the cause and prejudice standard is met.[1]

[1] See the discussion on this infra.

As to the rehearing motion, Petitioner concedes the case of Price Wise Buying Group v. Nuzum, 343 S.2d 115, 117 (Fla. 1st DCA 1977), cited in the panel opinion, is controlling unless the exception for "interest of justice" is granted. (En Banc Brief of Petitioner pages 11-12). A more accurate definition of the exception is found in Regan v. ITT Industrial Credit Company, 469 So.2d 1387, 1390 (Fla. 1st DCA 1984). There, Appellant filed a motion for extraordinary relief after filing a motion for rehearing. The appellate court granted the relief requested and withdrew its prior opinion as offensive to "fundamental principles governing the administration of justice." Id. at 1390. Fundamental error was also mentioned as the standard by Florida's Fourth District Court of Appeal in Polyglycoat Corporation v. Hirsch Distributors, 442 So.2d 958 (Fla. 4th DCA 1984). There, the failure to argue the other party's lack of objection until the opinion issued was held insufficient for rehearing purposes.

The strict application of this rule is not subject to serious dispute. See generally Nelson v. Seldon Cyprus Door Company, 78 Fla. 203, 83 So. 286 (Fla. 1919) (no allowance for new issue on rehearing); Taylor v. Finlayson, 176 So. 44 (Fla. Div. B., 1936) (rehearing only by special permission); and Fiesta Fashion Inc. v. Capin, 350 So.2d 1047, 1052-53, (Fla. 3d DCA 1979) approved 397 So.2d 643 (Fla. 1981) and

cases cited therein. Petitioner cannot meet the exception because his overlooked issue was not fundamental in nature. As admitted in footnote 8 of Petitioner's En Banc Brief, the particular claim on exclusivity of mitigating factors was rejected by the Florida Supreme Court, some six weeks prior to its denial of rehearing without opinion in Petitioner's case, in Songer v. State, 365 So.2d 696, 700 (Fla. 1978). Logically, no fundamental error exception could exist to excuse Petitioner's default if the court had previously found no error in the statute from which the instruction was derived.

Petitioner places much emphasis on the language used by the state supreme court in denying the motion for rehearing and holding the Respondent's motion to strike moot. Petitioner suggests the failure to strike its rehearing motion compels the conclusion that the court accepted the pleading as a valid exception to its own rule and reached a decision on the merits. Alternatively, Petitioner contends that the absence of certainty regarding application of a procedural bar, due to the brevity of the order on rehearing, places this court in a position from which it must address the merits. Compare Campbell v. Wainwright, 738 F.2d 1573, 1577 (11th Cir. 1986); and Oliver v. Wainwright, 795 F.2d 1524 (11th Cir. 1986). This argument has several flaws.

First, the court must keep in mind the phrasing of Florida's rehearing rule and its extremely limited focus on matters the court has overlooked or misapprehended. The Florida Rule follows the federal provision. Rule 40, Federal Rules of Appellate Procedure. The similarity does not end with the rules. The Federal appellate courts will not reverse a lower court on the basis of a claim not raised at trial or in the appellate court prior to the filing of a rehearing petition. Vaz Borralho v. Key Dril Company, 710 F.2d 207, 213 (5th Cir. 1983). A Federal Court of Appeals order denying rehearing does not imply a judgment on the merits and has no jurisprudential significance." In Re Grand Jury Investigation of Hartzell, 542 F.2d 166, 173 (3d Cir. 1976) cert. denied, 97 S.Ct. 755 (1977). Nor does a Federal appellate court reach the merits of a motion to strike for mootness (and implicity deny the motion) when it renders an order stating "upon consideration of the arguments of Appellee, the petition for rehearing and motion to supplement the record are hereby denied." Crider v. Kedhane, 526 F.Supp. 727 (D.C. Okla. 1981).

Second, the court must keep in mind the binding precedent of Ratcliff v. Estelle, 597 F.2d 474, 478 (5th Cir.) cert. denied, 444 U.S. 868 (1979) wherein the brevity of an appellate opinion of the state courts was tied to a detailed order finding procedural bar by the trial court, so

as to overcome the presumption that the merits were reached by the appellate court. This holding is critical to analyzing the current matter because it provides a framework for the application of an independent and adequate state law basis for denying relief.

Florida's Supreme Court promulgates the state rules of appellate procedure. Article V, Section 2(A), Fla. Const. The rules of appellate procedure expressly forbid (in contrast to Oklahoma's Rule 1.18) the raising of new issues or their consideration on rehearing.[2] The panel's citation to former Rule 3.14(b) of the Florida Appellate Rules (1962) and the cases of Leslie Brothers v. Roope, 108 Fla. 289, 148 So. 212 (Fla. 1933) and Price Wise Buying Group, supra, accurately reflect this. Hargrave at 1187.

[2]Petitioner's analogy comparing his case with Eddings v. Oklahoma, 455 U.S. 104 (1982) misses the mark. The real analogy, if one exists, is between Eddings and Songer v. State. Songer was the Florida Supreme Court's choice for exploring if Lockett v. Ohio had triggered any fundamental changes in the death penalty law, and it therefore utilized the exception to its rule against litigation of new issues on rehearing. Once the court satisfied itself that Lockett did not impact upon the administration of capital punishment in Florida in any fundamental manner, there was no basis to utilize the exception to the rule in the instant case. This explains why, six weeks after Songer, the Petitioner's rehearing was denied.

Just as a federal district court must assume a summary denial of an appeal from an order applying a procedural default analysis means the merits were not reviewed, so must it assume the state appellate court adhered to its own strict default rule for rehearing motions when the state appellate court holds:

> Upon consideration of [the] petition for rehearing filed by attorney for appellant.
>
> It is ordered by the court that said petition be and the same is denied. Appellee's motion to strike is hereby moot.
>
> (S.R.122).

Petitioner is incorrect in assuming the Florida Supreme Court had to affirmatively strike his motion for rehearing to apply a procedural bar to his newly raised Lockett claims. Unlike the situation in Oliver v. Wainwright, 795 F.2d 1524 (11th Cir. 1984), the indication of the application of a procedural bar is inherent in the rules of appellate procedure. In other words, the complete opposite of Petitioner's argument is true. An affirmative showing must be made to avoid procedural default and an invocation of the exception for fundamental injustice must be forthcoming from the appellate court. The same was not true in the Oliver case where a per curiam affirmance was not anchored to any framework as sturdy as the rule on matters for rehearing.

This conclusion is not diminished by the state court's declaration that the Appellee's motion to strike was rendered moot, or the Court's failure to strike the rehearing motion on its own initiative. Rather, one must consider the meaning behind a declaration of mootness within the context of the litigation. For example:

> A case becomes moot, for purposes of appeal, where, by a change of circumstances prior to the appellate decision, an invervening event makes it impossible for the court to grant a party any effectual relief. 3 Fla.Jur.2d, Appellate Review, § 287, p. 337. Mootness can be raised by the appellate court on its own motion. DeHoff v. Imeson, 153 Fla. 553, 15 So.2d 258 (1943); Barrs v. Peacock, 65 Fla. 12, 61 So. 118 (1913).
>
> Montgomery v. Department of Health and Rehabilitative Services, 468 So.2d 1014, 1016 (Fla. 1st DCA 1985).

In this case the application of Rule 3.14(b) of the Florida appellate rules rendered the state's motion to strike moot. Obviously, the Court had reviewed the Songer rehearing and found no basis to invoke the exception to Rule 3.14(b) in Petitioner's case.

Because no exceptional basis existed, post-Songer, for allowing new issues to be raised and considered by motion for rehearing, the rule barred consideration of the Lockett issues and the state's motion to strike was rendered moot - relief was granted by the rule rather than by motion.

2. The Supplemental Brief

Four months and eight days after filing an initial brief on the merits and well after the time for filing a reply brief had passed, Petitioner raised two new claims via supplemental brief: (1) limited presentation of mitigating evidence by counsel and (2) lack of consideration of non-statutory mitigation by the trial court. (En Banc Brief of Petitioner, page 6). Petitioner now concedes this action was inappropriate under former Rule 3.7(d), Florida Appellate Rules (1962) and current Rule 9.210(a), Florida Rules of Appellate Procedure.

There are exceptions to these rules and they follow the general standard in Florida law for excusing a lack of objection at trial or a failure to raise an issue until the filing of a motion for rehearing: fundamental interests of

justice will excuse the procedural error. Petitioner cites to some of these cases. City of Miami v. Murphy, 137 So.2d 825 (Fla. 1962) is a classic example. By unauthorized supplemental brief the Appellant raised an issue alleging fundamental error not presented in the lower court. Because "at first glance the position of the Appellant appears both plausible and meritorious.", the Supreme Court reached the merits. Id. 827. Likewise, Jarrard v. Associates Discount Corporation, 99 So.2d 272 (Fla. 1957) involved a direct conflict between a 1952 Florida Supreme Court decision and the then-current rules of civil procedure. Id. at 276. Therefore, the Court allowed a supplemental brief to be filed and considered on the merits. Wolack v. State, 464 So.2d 587 (Fla. 4th DCA 1985) involved a supplemental brief on the then per se reversible issue of comments on the right to remain silent. Under former Florida law such comments were per se reversible error. See Willinsky v. State, 360 S.2d 760, (Fla. 1978). Morgano v. State, 439 So.2d 924, 926 (Fla. 2d 1983) involved a supplemental brief on the question of forcing a person to trial on criminal charges without his lawyer, a situation the Court noted was one of first impression in the State. The supplemental brief in Garcia v. State, 492 So.2d 360, 367 (Fla. 1986) did not raise a new

issue. The supplemental brief in Parker v. State, 476 So.2d 134, 138 (Fla. 1985) raised the new rule of State v. Neil, 457 So.2d 481 (Fla. 1984) which effectively overturned Swan v. Alabama, 380 U.S. 202 (1965) as a matter of state law. The remaining cases fall within similar fundamental principles of justice parameters.

What is critical to this court's review of these types of cases is that the Florida Supreme Court mentions the supplemental brief and explains why the issue was so important to the administration of justice as to justify waiving the rule. Absent any similar discussion in Hargrave v. State, 366 So.2d 1 (Fla. 1978), it is clear the Florida court did not allow an exception to the rule prohibiting supplemental briefs. Furthermore, Jackson v. State, 452 So.2d 533, 536 (Fla. 1984) is not helpful to Petitioner. While it is true the Florida Supreme Court will review the entire record, the only matter it is required to review independently of a proper brief on the merits is "...The evidence to determine if the interest of justice requires a new trial, whether or not insufficiency of the evidence is an issue presented for review." Florida Rule of Appellate Procedure 9.140(f). See also Florida Statute Section 921.141(4) (1972), and Sundell v. State, 354 So.2d 409 (Fla. 1978).

Lastly, Thomas v. State, 421 So.2d 160, 163 (Fla. 1982), cited by Petitioner in footnote 6 of his En Banc Brief, is not applicable. In an alternative ruling the Thomas opinion noted the filing of a supplemental brief as indicative of Appellate counsel's effectiveness. That holding fails to change the outcome concerning a defaulted direct appeal issue. Petitioner had an ineffectiveness of counsel claim pending in the district court but abandoned it on appeal. Therefore, Thomas is not dispositive. cf Johnson v. Wainwright, 778 F.2d 623, 628 (11th Cir. 1985). (State court rejection of ineffectiveness of Appellate counsel claim not equal to review on merits.)

3. The Post-Conviction Motion

Petitioner seeks to create a conflict between the panel decision and Campbell v. Wainwright, 738 F.2d 1573, 1576 (11th Cir. 1984). In the instant case no state trial court or appellate court ever reached the merits of the Lockett claims on direct appeal, motion for post-conviction relief in the trial court or appeal from the denial of the motion for post-conviction relief. Hargrave, 804 F.2d at 1188-89 N. 11 and 13. (See also the discussion therein on the appellate rule governing new issues on rehearing and filing of supplemental briefs, and the panel's recognition of Petitioner's failure to timely object at trial to the jury

instruction on mitigation). In contrast, Campbell involved a detailed order from the trial court discussing the issues raised by motion for post-conviction relief in somewhat vague terms, to wit:

> The Court further finds that all other issues asserted have been foreclosed by the appeal in this case, were judgment decisions of Petitioner's counsel, or are otherwise insufficient to justify the relief sought by movant.
>
> IT IS, THEREFORE, UPON CONSIDERATION THEREOF ORDERED AND ADJUDGED that the Motion to Vacate the Judgment and Sentence, bearing date of March 13, 1974, and any and all other similar motions or petitions filed heretofore by the Movant are hereby denied.
>
> Id. at 1577.

This order was affirmed without opinion. Campbell v. State, 338 So.2d 843 (Fla. 1st DCA 1976). With nothing else to work with this Court concluded:

> In affirming this order, the Florida appellate court provided no indication that it would not consider Campbell's allegations because he failed to raise them on appeal. Although the state argues that, in the part of the order stating that some issues were "foreclosed by the appeal," the judge applied a bar as to those issues that could have been raised on appeal, we do not find this

> phrase to be so clear. The court may have meant that the issues were correctly decided adversely to Campbell on appeal, and need not be discussed further. In any event, because of the alternative phrasing of the court's order, we cannot determine which issues the court may have considered to be "foreclosed." Given this situation, a federal court must address the merits.
>
> Campbell at 1577 (footnotes omitted).

In Hargrave v. State, 396 So.2d 1127 (Fla. 1981) the appellate court provided a sufficient basis for determining the application of a procedural bar to the Lockett claims. First, the Court noted:

> The 3.850 motion asserts a multitude of grounds for relief, from constitutional and non-constitutional error in the guilt phase of the trial to alleged fundamental defects in the sentencing process.

Then in a footnote it showed how it had recently applied a procedural default analysis to Petitioner's presentation of direct appeal issues by writ of habeas corpus in Hargrave v. State, 388 So.2d 1021 (Fla. 1980). Lastly, the Court held the trial court was correct in ruling the issues, "...Either were or could have been raised on direct appeal or they involve changes in decisional law not congnizable in a 3.850 motion." Hargrave, 396 So.2d 1127-28. Five State

Supreme Court cases followed that sentence. A review of those cases demonstrates conclusively that a procedural default on all Lockett claims was found in the state court.

Adams v. State, 380 So.2d 423 (Fla. 1980) applied procedural bar to issues of prosecutorial misconduct and lack of a proffer of mitigating evidence at the original trial. The Court addressed the merits of a claim of ineffectiveness of counsel at sentencing and the merits of an eighth amendment challenge to the arbitrary and capricious imposition of the death penalty based on the imposition of the penalty in four cases over a four year period in the country. However it did not address Lockett claims.

Sullivan v. State, 372 So.2d 938 (Fla. 1979) discussed allegations of ineffective assistance of counsel. Again, it did not discuss Lockett.

Spenkelink v. State, 350 So.2d 85 (Fla. 1977) discussed a collateral attack issue, the assertion that potential jurors were excluded from the panel, and held the claim was one for direct appeal and barred under Wainwright v. Sykes, 433 U.S. 72 (1977). The Court also found Wainwright barred review of an issue involving the Defendant's confession. Again, no Lockett claims were involved.

State v. Matera, 266 So.2d 661 (Fla. 1972) involved allegations of perjury raised for the first time on collateral attack. Again the keystone of the opinion was a determination that issues known at the time of direct appeal could not be ignored and later raised by collateral attack. Sentencing was not discussed.

Sentencing was discussed however in the final case cited by the Court. Witt v. State, 387 So.2d 922 (Fla. 1980) cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612:

> By this appeal Witt raises essentially six issues, all of which he admits either were raised in the direct appeal from his conviction and sentence, or could have been raised at that time. He predicates his appeal on alleged changes in case law since his first appeal was concluded, asserting the right to obtain the benefits of subsequent, favorable case law developments relating to capital punishment and to criminal law generally. The particular changes which Witt presents for our consideration are these:
>
> * * *
>
> (5) an alleged change in the law, reflected by an aggregation of the individual opinions in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), requiring that the state, before imposing

> the death penalty, establish that the defendant intended to kill the victim;
>
> Id. at 924.

This particular aspect of Lockett is not relevant to Petitioner's case. What is relevant is the detailed and articulate discussion of the tension between "ensuring finality of decisions on the one hand, and ensuring fairness and uniformity in the individual cases on the other..." Id. at 925. Ultimately, the Witt opinion concluded that only major changes in constitutional law will be cognizable under Rule 3.850,and that the Defendant's Lockett claim did not present a change in law. Id. at 929-30. This leads to the inescapable conclusion that the Florida Supreme Court never reviewed the merits of the Lockett claim on appeal from the denial of Petitioner's motion for collateral attack.

Petitioner's argument in footnote 13 of his En Banc Brief does not properly explain the problem. First, the Florida Supreme Court has recently declared that Harvard v. State, 486 So.2d 537 (Fla. 1986) does not reflect a fundamental change in law. Aldridge v. State, 12 FLW 129 (Fla. March 12, 1987) (holding failure to raise Lockett claim on direct appeal barred it on collateral attack. Court noted Harvard was factually unique). The same is true of the facts in

Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc):

> The fact that the Florida Supreme Court has now held that neither the wording of the Florida Statute nor its prior decisions precluded the introduction of non-statutory mitigating evidence, Songer v. State, 463 So.2d 229 (Fla. 1985), relying on Songer v. State, 365 So.2d 696 (Fla. 1978), is not controlling in the instant matter. That court has recognized that the law could have been so "misconstrued." See Perry v. State, 395 So.2d 170, 174 (Fla. 1981). The critical and dispositive fact here is that the state trial judge did misinterpret the law and thus failed to consider any nonstatutory mitigation at the time of imposing the sentence of death. Although that sentence was vacated, Songer v. Florida, 430 U.S. 952, 97 S.Ct. 1594, 51 L.Ed.2d 801 (1977), due to a Gardner violation, upon resentencing the state trial judge limited petitioner to reviewing and rebutting the presentence investigation report. Consequently, it is clear that the state sentencing judge refused to give any consideration to non-statutory mitigating evidence at either the first or second sentencing proceedings. The interests of justice require that this be corrected.

In the present case, unlike Songer, the interests of justice were not violated because, as will shortly be demonstrated, the trial court here did not limit either the introduction or consideration of non-statutory mitigating evidence.

B. THE PETITIONER HAS NOT DEMONSTRATED CAUSE OR PREJUDICE SO AS TO AVOID HIS STATE PROCEDURAL DEFAULT

1. CAUSE

In Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986) rehearing pending, limited on other grounds, Harich v. Wainwright, No. 86-3167,(11th Cir. March 18, 1987), this Court held:

> Consideration of a claim also can be barred by failure to comply with state procedural rules, absent a showing of cause for, and prejudice resulting from, such failure. Wainwright v. Sykes, 433 U.S. 72, 87, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594 (1977); accord, Engle v. Isaac, 456 U.S. 107, 110, 102 S.Ct. 1558, 1562, 71 L.Ed.2d 783 (1982). A significant change in applicable law, however, can both excuse the failure to raise a claim in a previous petition, Witt, 755, F.2d at 1397, and establish cause to excuse procedural default in state court. Reed v. Ross, 468 U.S. 1, 16, 104 S.Ct. 2901, 2910, 82 L.Ed.2d 1 (1984).
>
> Id. at 1530.[3]

[3]The other method of establishing cause to avoid default is to prove appellate counsel was ineffective. For a discussion of this situation see Cartee v. Nix, 803 F.2d 296, 299-302 (7th Cir. 1986) (discussing failure to raise jury instruction issue not preserved by objection at trial and rejecting claim of ineffectiveness).

Adams goes on to describe how a major change in law that was not reasonably available prior to the new decision can establish cause. Id. at 1530-31. Footnote 5 of this opinion explains why the Court found the particular issue not available prior to a recent United States Supreme Court pronouncement.

Adams neither controls here nor conflicts with the panel's decision. The panel opinion, subsection II(c), accurately states the controlling Supreme Court precedent, properly enunciates the type of claim raised by Petitioner, and correctly concludes "clearly, there was a reasonable basis in 1975 upon which Petitioner could have made the constitutional challenge he wishes to make today." Hargrave, 804 F.2d 1190. In addition to the panel's discussion of the matter, one can look to any number of United States Supreme Court decisions as a providing reasonable basis upon which Lockett type claims could have been raised. For example in the 1937 decision, Pennsylvania ex. rel Sullivan v. Ashe, 302 U.S. 51, 82 L.Ed. 43 (1933), it was held:

> For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities

> of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him.
>
> Id. 302 U.S. 55.

Compare, California v. Brown, 479 U.S.___, 107 S.Ct. ___, 93 L.Ed.2d 934, 942 (1987) (O'Conner J. concurring) ("this emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence); Woodson v. North Carolina, 428 U.S. 280, 295-96 (1976); and McGautha v. California, 402 U.S. 183, 201-207 (1971) (discussing past efforts at solving the parameters for jury involvement in capital sentencing, including the model penal code §210(6) [proposed official draft, 1962]).

Therefore, unlike the situation addressed in footnote 5 of Adams, supra, this case rests in the percolating waters of evolving legal theory. "Under these circumstances, it simply is not open to argue that the legal basis of the claim Petitioner now presses on federal habeas was unavailable to counsel at the time of the direct appeal." Smith v. Murray, 477 U.S. __ , 91 L.Ed.2d 434, 446 (1986).

Petitioner's analysis stresses the line of cases holding that appellate lawyers who failed to raise this type of claim were not ineffective due to a belief that mitigating circumstances were properly limited by the state. Hitchcock v. Wainwright, 770 F.2d 1514, 1516--17 (11th Cir. 1985) (en banc) cert. granted, U.S.__, 106 S.Ct. 2888 (1986). Petitioner raised appellate counsel's ineffectiveness in the district court. However, he limited his grounds to reviewing counsel's failure to raise issues concerning post-arrest statements and prosecutorial misconduct. Now, for the first time, Petitioner suggests he can borrow portions of the law on ineffectiveness, detailing when a claim is "available" to a lawyer, and plug those rulings into a "cause" analysis. These are mutually exclusive considerations and the Court should recognize that cases such as Hitchcock, reviewing "availability" as it relates to a lawyer's duty to advance his client's most promising arguments on appeal, are not applicable to resolving the inquiry raised in Reed v. Ross, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984) and latter explained in more detail in Murray v. Carrier, 477 U.S. ___, 106 S.Ct. ___, 91 L .Ed.2d 397 (1986):

> We think, then, that the question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in Strickland v. Washington, supra, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default. Instead, we think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. Without attempting an exhaustive catalog of such objective impediments to compliance with a procedural rule, we note that a showing that the factual or legal basis for a claim was not reasonably available to counsel, see Reed v. Ross, 468 US, at 16, 82 L.Ed.2d 1, 104 S.Ct. 2901, or that "some interference by officials," Brown v. Allen, 344 US 443, 486, 97 L.Ed. 469, 73 S.Ct. 397 (1953), made compliance impracticable, would constitute cause under this standard.
>
> Id. at 91 L.Ed. 408.

* * *

AND:

> Ineffective assistance of counsel, then, is cause for a procedural default. However, we think that the exhaustion doctrine which is "principally designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings," Rose v. Lunday, 455 US 509, 518, 71 L.Ed.2d 379, 102 S.Ct. 1198 (1982), generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.
>
> Id. at 409.

Petitioner has ignored the line of demarcation between "cause" analysis and "ineffectiveness of counsel" analysis in an attempt to create a hybrid: "cause" built on a series of cases holding counsel was not ineffective for failing to raise the claim now said to be procedurally defaulted. Accepting of this theory would result in a dilution of the current rulings of the United States Supreme Court indicating that the present test for cause and prejudice is a "sound and workable means of channelling the discretion of federal habeas courts." Id. at 414.

2. PREJUDICE

The district court found no actual prejudice was established by the Petitioner on any aspect of the

Lockett claims. There was no limiting instruction by the Court. No limitation in the introduction of non-statutory mitigation such as Petitioner's steady employment, below average intelligence, use of drugs and sociopathic personality, (Order of the District Court, pages 9-10),[4] and no limitation on counsel's arguments to the jury regarding these non-statutory factors. The district court went on to note that the sentencing judge did discuss and consider the non-statutory mitigation in his order.

The identical argument presented herein was made and rejected by this Court in Alvord v. Wainwright, 725 F.2d at 1299. Therein, this Court, speaking through Judge Hill, observed:

> In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Supreme Court held that the 'sentencer (must) not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffered as a basis for a sentence less than death.' (cite omitted). Alvord contends that the jury

[4]As footnoted by the district judge, the Petitioner conceded this evidence was elicited during testimony that also dwelt on statutory mitigation.

instructions at the sentencing hearing violated the Lockett rule by limiting the jury to considering only statutory mitigating circumstances. See Washington v. Watkins, 655 F.2d 1346, 1377 (5th Cir. Unit A 1981) (invalidating sentence on basis of faulty instructions), cert. denied 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982). The district court correctly analyzed and resolved this issue.

The judge instructed the jury in this case that the 'aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence...' and then listed the statutory aggravating circumstances. The judge then instructed the jury that the 'mitigating circumstances which he may consider if established by the evidence are these...' and then listed the statutory mitigating circumstances. In Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc),

> Instructing the jury on aggravating circumstances, stated, 'You shall consider only the following...,' and read the statutory language. With regard to mitigating circumstances, he said, 'You shall consider the following...,' omitting the word 'only' and again reading the appropriate statutory language.
> (cite omitted).

We see no distinction of importance between the language used in Ford

> and that used in the present case. In neither situation did the trial judge commit the error present in Washington v. Watkins, in which the charge 'operated affirmatively on preclude jury consideration of non-statutory mitigating factors.' (cite omitted). Also, in both this case and Ford's the judge permitted the defendant freely to introduce evidence without regard to its statutory relevance. Plus, the sentence is not invalid under Lockett.
>
> 725 F.2d at 1299.

Similar results are found in Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985) (refusing to issue writ where district court had denied relief on basis of state court records showing that former Florida law had little, if any, effect on sentencing); Straight v. Wainwright, 772 F.2d 674 (11th Cir. 1985) (lack of objection at trial to similar instruction and lack of proof trial court limited his review of proffered non-statutory mitigation justified affirmance of sentence); Francois v. Wainwright, 763 F.2d 1188, 1190-91 (11th Cir. 1985); Johnson v. Wainwright, 806 F.2d 1479, 1484 (11th Cir. 1986) (trial judge allowed jury to hear non-statutory mitigation and later noted that he had not disregarded any mitigating evidence offered at trial or penalty phase); Dobbert v. Strickland, 718 F.2d 1518, 1524

(11th Cir. 1983); Booker v. Wainwright, 703 F.2d 1251 (11th Cir. 1983) and Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983.[5]

Petitioner's assertion that the actions of his counsel limited the presentation of non-statutory mitigating evidence, and that the trial court and State Supreme Court ignored the non-statutory mitigating evidence provided during trial, is wholly erroneous. First, the transcript indicates trial counsel vigorously argued for a pre-sentence investigation report by stating "I just feel that every possibility, no matter how remote, must be explored." (S.T. 1087-1088). Second, defense counsel presented witnesses who concededly provided evidence of non-statutory mitigating circumstances and argued these matters to the jury. (Opinion of the district court page 10, footnote 2.). Third, the trial court considered the non-statutory mitigation factors of Petitioner's employment, intelligence and personality flaws in its sentencing order. Lastly, the Florida Supreme Court would have reviewed the non-statutory

[5] These last three cases are discussed in detail in Respondent's original brief in this case at pages 28-31. These arguments are adopted and reasserted by Respondent at this time.

mitigating evidence in the context of a properly presented issue. At first blush the opinion is not totally clear on this point, and Justice Hatchett's dissent, 366 So.2d at 6, raises serious concern about how the Court was generally interpreting the law:

> The position taken by the majority, in its reliance on Thompson, suggesting that there is no sentencing discretion left in the trial judge raises serious questions concerning the constitutionality of our present statute.
>
> Id. at 7.

However, as discussed supra, any concerns about Lockett's impact on Florida's statute were confronted in the rehearing of Songer v. State:

> We have approved a trial court's consideration of circumstances in mitigation which are not included on the statutory list in Washington v. State, 362 So.2d 658 (Fla. 1978); Buckrem v. State, 355 So.2d 111 (Fla. 1978); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Meeks v. State, 336 So.2d 1142 (Fla. 1976); Messer v. State, 330 So.2d 137 (Fla. 1976); and Halliwell v. State, 323 So.2d 557 (Fla. 1975), among others. Obviously, our construction of Section 921.141(6) has been that all relevant circumstances may be considered in mitigation, and that the factors listed in the statute

> merely indicate the principal factors to be considered. This construction of the statute, and its continued validity, were noted most recently in Spinkellink v. Wainwright, 578 F.2d 582, 620-21 (5th Cir. 1978), where the court was presented with an identical challenge to our death penalty statute based on Lockett v. Ohio.
>
> Id. at 700

The later denial, without opinion, of Petitioner's unauthorized rehearing petition and supplemental briefs cannot be viewed outside the context of Songer. Had there been a problem with how the Court treated the instant case post-Songer, one would assume previous notes of dissent would have been restated. But recall, Petitioner in fact waived these issues, and absent fundamental concerns he was not entitled to have the State Supreme Court review the merits beyond the parameters of the trial court's order sentencing Petitioner to death.

C. THE PROFFERED MITIGATION

Petitioner claims he was denied the opportunity to present additional mitigation for consideration prior to sentencing. This is refuted by trial counsel's arguments to the Court and the testimony of Petitioner's mother and an expert witness, Dr. Sylvester. (S.T. 998). These witnesses did divulge significant non-statutory mitigation. (Order of

the district court, footnote 2).

Evidence of Petitioner's background and history, including allegations of abuse by his father (En Banc Brief of Petitioner, page 32, footnote 26) would have contradicted the testimony of Petitioner's mother that she and the father tried to give their son a good home and raise him properly. (S.T. 1097-98). Thus, regardless of its impact, it cannot be said that presentation of this additional evidence would have affected the sentencing decision of the Court or the recommendation of the jury. See Thomas v. Wainwright, 767 F.2d at 746-747, discussing the strategic need for consistency in presenting mitigating evidence.

Furthermore, even assuming the evidence would not be too inconsistent to present in a sentencing hearing, it would be only cumulative to the detailed testimony of Dr. Sylvester, which revealed Petitioner as a man with a dull-normal intelligence quota and a mental age of sixteen or seventeen. (Petitioner was nineteen at the time). (S.T. 990-91, 1004). The doctor found documented evidence suggesting brain damage affecting the thinking process, possibly from extensive drug use. (S.T. 992-93). The doctor also told the jury he found:

> Morbid preocupation with material which suggested a good deal of insecurity, apprehension, fear and of course the consequent rebellion against this is striking back of not knowing just what is wrong with him. (S.T. 993)

In light of Petitioner's current emphasis on Eddings v. Oklahoma, supra, in this context it should be clear that any further evidence of non-statutory mitigation would have been cumulative and not sufficient to affect the outcome. Thompson v. Wainwright, 787 F.2d 1447, 1457 (11th Cir. 1986).

Lastly, trial counsel forcefully argued non-statutory mitigation to the jury. Characterizing his client as a "defective child" (S.T. 1066) who should not be treated to "spartan tactics" and left to die on an "electrically charged plain." (S.T. 1066-67). Counsel went over the findings of Dr. Sylvester and Dr. Corwin, and asked the jury to think carefully about whether "we are dealing with a person who is the kind of person the legislature had in mind..." for capital punishment. (S.T. 1069-1073).

This argument is identical to the type of argument approved by this Court in Harich v. Wainwright, supra, wherein the Court rejected both a request for an evidentiary hearing and a finding of prejudice on the record:

Counsel offered evidence showing that Harich was a good worker and a model prisoner. Dr. McMahon testified that the attack was an isolated "explosion" and that such an outburst was unlikely to happen again. Finally, counsel's closing argument was passionate and convincing. Counsel forcefully contested each of the proposed aggravating circumstances and defended each of the proposed mitigating circumstances. He pointed out that Harich was a young, first offender who was operating under extreme emotional disturbance at the time of the murder.

We agree with the district court and with the Florida Supreme Court that the failure to present additional mitigating evidence, even if the result of counsel's neglect, does not undermine our confidence in the outcome of the sentencing proceeding.

* * *

Counsel, in his closing argument, described Harich's personal life, reviewed the aggravating and mitigating circumstances, and argued eloquently for leniency. Thus, since Harich has made an insufficient showing of prejudice, there is no need to remand for an evidentiary hearing with respect to this issue.

(slip opinion, page 20-21)
(citations and footnote omitted).

A similar result, if the Court reaches beyond the procedural bar and cause requirement, should occur here - either as to the "prejudice" aspect of the bar, or on the merits of the claim that additional evidence would have affected the jury or judge in their respective decisions.

D. THE IMPACT OF THE INSTRUCTIONS

The last portion of this first issue is covered supra in the discussion on the cause and prejudice standard.

Recall that no objection was raised to any of the jury instruction pre, or post, verdict in regard to what was proper mitigation. Furthermore the district court did cite Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc) cert. denied, 464 U.S. 865 (1983), which is the controlling precedent in this matter. As recently noted in California v. Brown, 479 U.S. ___, 93 L.Ed.2d 934, 940 the entire context of the instruction is revieved only when the particular instruction fails constitutional muster. The instruction on mitigating evidence given during the sentencing phase must be looked at from the perspective of a reasonable juror who had been presented non-statutory mitigating evidence and related argument from defense counsel just prior to making his decision. Like the situation in Brown, the instant case fails to violate the

Lockett standard. Unlike Lucas v. State, 490 So.2d 943 (Fla. 1986) the trial court never specifically precluded the consideration of non-statutory mitigation by instruction to the jury. The burden is upon Petitioner to show this instruction appreciably affected his sentence. Given the detailed record in this case it is certain that he has failed to do so. The district court and the panel of this Court were correct in denying Petitioner any relief.

II

SECTION 921.141 (5)(h), FLORIDA STATUTES (1975), WHICH ESTABLISHES AS A POTENTIAL AGGRAVATING CIRCUMSTANCE THAT A HOMICIDE WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL," IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS APPLIED IN THIS CASE BY THE STATE TRIAL COURT AND THE SUPREME COURT OF FLORIDA.

In his motion for rehearing Petitioner did not challenge this Court's ruling on the constitutionality of the "heinous, atrocious, or cruel" aggravating circumstance as applied to the facts of this case. Respondent therefor respectfully submits that further review is unwarranted, and that the segment of the opinion relating to this issue should be reinstated.

In any event, this Court's prior determination was unquestionably correct. As this Court noted in its opinion, the Florida Supreme Court has developed a precise and limited standard for applying this aggravating circumstance:

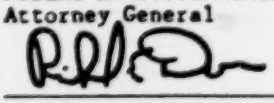
the murder must be accompanied by such additional torturous acts as to set the crime apart from the norm. Proffit v. Wainwright, 685 F.2d 1227, 1263 (11th Cir. 1983), cert. denied, 464 U.S. 1002 (1983). Where the victim is initially rendered helpless or incapacitated, as by wounding or binding, and then subsequently executed, this aggravating factor is appropriate. In addition to the cases cited by this Court in its opinion, Respondent would cite Phillips v. State, 476 So.2d 194 (Fla. 1985), where the victim was shot twice in the chest, then finished off with two shots to the head after the Defendant reloaded, Squires v. State, 450 So.2d 208 (Fla. 1984), where the victim was wounded by a shotgun blast and then killed by additional shots from a revolver, Troedel v. State, 462 So.2d 392 (Fla. 1984), where the victim survived initial head wound but succombed following second head shot, and Henderson v. State, 463 So.2d 196 (Fla. 1985), where the victim was bound, gagged and shot execution style. In the instant case the victim was shot twice and left helpless while Petitioner consumated the robbery, eventually returning to pump a final fatal round into the victim's skull. Given these facts, this aggravating factor was clearly established.

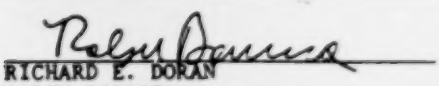
CONCLUSION

Based on the foregoing authorities and arguments presented, Respondent would urge this Court to affirm the denial of Hargrave's petition for writ of habeas corpus and reinstate the panel opinion.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General





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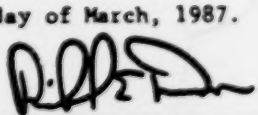
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing EN BANC BRIEF OF RESPONDENT-APPELLEE was furnished by mail to ELLIOT H. SCHERKER AND KAREN N. GOTTLIEB, Assistant Public Defenders, 1351 N. W. 12th Street, Miami, Florida 33125, on this 27TH day of March, 1987.



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